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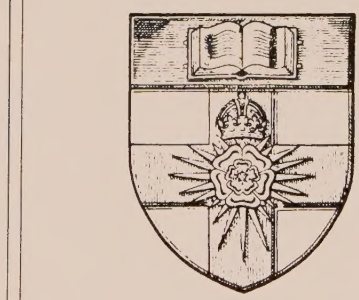

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Anderson *v.* Vicary	436
Anglo-Argentine Live Stock and Produce Agency *v.* Temperley Shipping Company	403
Appleby *v.* Horseley Company (C. A.)	521
Attorney-General *v.* Carlton Bank	158
——— *v.* Coulson	253
——— *v.* De Préville	238
——— *v.* Furness Railway Company	267
——— *v.* Hay	245
——— *v.* London County Council	226
——— *v.* Newcastle-upon-Tyne Corporation (C. A.)	478
——— *v.* Owen	253
——— *v.* Smith-Marriott	595

B.

	PAGE
Bahr & Co., Steamship Isis Company *v.* (C. A.)	364
Bale, Ex parte. In re O'Gorman	62
Belton *v.* Busby	380
Birmingham Battery and Metal Company, Williams *v.* (C. A.)	338
Bishop, Equitable Life Assurance Society of the United States *v.*	439
Booker & Co. *v.* Pocklington Steamship Company	690
Brankelow Steamship Company *v.* Canton Insurance Office (C. A.)	178
Brearley *v.* Morley	121
Brighouse Corporation, Walshaw *v.* (C. A.)	286
Bullock, In re. Ex parte Ward	517
Busby, Belton *v.*	380

C.

PAGE

Calvert, In re. Ex parte Calvert 145
Cameron *v.* Tyler 94
Canton Insurance Office, Brankelow Steamship Company *v.* (C. A.) 178
Carlton Bank, Attorney-General *v.* 158
Carritt *v.* Godson & Son 193
Chambers, Flowers *v.* (C. A.) 142
——— *v.* Whitehaven Harbour Commissioners (C. A.) 132
Chandler *v.* Smith (C. A.) 506
Chesterfield Brewery Company *v.* Inland Revenue Commissioners 7
China Traders Insurance Company, Iredale *v.* 356
Clutterbuck, Gooch *v.* (C. A.) 148
Coulson, Attorney-General *v.* 253
Crowborough District Water Company, Uckfield Rural Council *v.* 664

D.

Dalgleish *v.* Lowther (C. A.) 590
Davey, Reg. *v.* 301
Davidson, In re. Ex parte Davidson 103
Davis & Timmins, Limited, Irons *v.* (C. A.) 330
Dawson, In re. Ex parte Dawson 54
De Préville, Attorney-General *v.* 238

E.

Edwards *v.* Godfrey (C. A.) 333
Elliott *v.* London County Council 277

PAGE

English and Colonial Syndicate, Pritchett *v.* (C. A.) 428
Equitable Life Assurance Society of the United States *v.* Bishop 439
Evans, Mercantile Bank of London *v.* (C. A.) 613

F.

Flinn & Sons, Ex parte 154
——— (No. 2), Ex parte 607
Flowers *v.* Chambers (C. A.) 142
Frost, In re. Ex parte Official Receiver 50
Furness Railway Company, Attorney-General *v.* 267

G.

Glamorgan County Council, Reg. *v.* Ex parte Miller 26

(C. A.) 536
Godfrey, Edwards *v.* (C. A.) 333
Godson & Son, Carritt *v.* 193
Gooch *v.* Clutterbuck (C. A.) 148
Goodfellow *v.* Gray (C. A.) 498
Gordon *v.* Street (C. A.) 641
Graham, Warwick *v.* 191
Gray, Goodfellow *v.* (C. A.) 498
Great Northern Railway Company *v.* Inland Revenue Commissioners 652
Great Western Railway Company *v.* London and County Banking Company 172

Luscombe *v.* 313
Green *v.* Thompson 1

H.

Hall *v.* Snowden, Hubbard & Co. (C. A.) 136
Halliwell, River Ribble Joint Committee *v.* (C. A.) 385

PAGE

Hancock, Moss *v.* 111
Harris, In re. Hasluck, Ex parte 97
Hasluck, Ex parte. In re Harris 97
Hay, Attorney-General *v.* 245
Hertfordshire (Sheriff of), Ex parte. In re Mackenzie (C. A.) 566
Hertfordshire County Council, Shaw *v.* (C. A.) 282
Hogarth *v.* Walker 401
Holliday *v.* National Telephone Company (C. A.) 392
Holness *v.* Mackay & Davis (C. A.) 319
Hooley, In re. Ex parte United Ordnance and Engineering Company 579
Horseley Company, Appleby *v.* (C. A.) 521
Horsey Estate, Limited *v.* Steiger (C. A.) 79
Hoskins, Westminster Vestry *v.* 474
Humber & Co., John Griffiths Cycle Corporation *v.* (C. A.) 414
Hutton, King *v.* 555
Hyderabad (Deccan) Company *v.* Willoughby 530

I.

I'Anson and Pearson, In re 618
Inland Revenue Commissioners, Chesterfield Brewery Company *v.* 7

Great Northern Railway Company *v.* 652
Iredale *v.* China Traders Insurance Company 356
Irons *v.* Davis & Timmins, Limited (C. A.) 330

J.

Jeffrey *v.* Weaver 449

PAGE

John Griffiths Cycle Corporation *v.* Humber & Co. (C. A.) 414
Jones *v.* Ocean Coal Company (C. A.) 124

K.

King *v.* Hutton 555
Kinson Pottery Company *v.* Poole Corporation 41

L.

Lane *v.* Rendall 673
Ledermann Frères and Tiedemann, In re 66
Lee, Prescott *v.* (C. A.) 273
Leicester Guardians, Reg. *v.* 632
Liverpool Corporation *v.* Llanfyllin Assessment Committee (C. A.) 14
Llanfyllin Assessment Committee, Liverpool Corporation *v.* (C. A.) 14
London and County Banking Company, Great Western Railway Company *v.* 172
London and North Western Railway Company, Williams *v.* 197
London and South Western Railway Company, Roche *v.* (C. A.) 502
London County Council, Attorney-General *v.* 226

Elliott *v.* 277
Lowther, Dalgleish *v.* (C. A.) 590
Luscombe *v.* Great Western Railway Company 313

M.

Macdonald, Williams *v.* 308
Mackay & Davis, Holness *v.* (C. A.) 319

	PAGE
Mackenzie, In re. Ex parte Sheriff of Hertfordshire (C. A.)	566
Mason, Sharman *v.*	679
Mercantile Bank of London *v.* Evans (C. A.)	613
Mersey Docks and Harbour Board, Union Credit Bank *v.*	205
Miller, Ex parte. Reg. *v.* Glamorgan County Council	26
(C. A.)	536
Monckton *v.* Payne	603
Morley, Brearley *v.*	121
———, White *v.*	34
Moss *v.* Hancock	111
Mutual Cycle and Manufacturing Supply Company, Osmond *v.* (C. A.)	488

N.

National Telephone Company, Holliday *v.* (C. A.)	392
Newcastle-upon-Tyne Corporation, Attorney-General *v.* (C. A.)	478
Newman, In re. Ex parte Official Receiver	587
Nicholson, Reg. *v.* (C. A.)	455
Nix *v.* Nottingham Justices (C. A.)	294
Nottingham Justices, Nix *v.* (C. A.)	294

O.

Ocean Coal Company, Jones *v.* (C. A.)	124
Official Receiver, Ex parte. In re Frost	50
———, Ex parte. In re Newman	587
———, Ex parte. In re Tankard	57
O'Gorman, In re. Ex parte Bale	62
Osmond *v.* Mutual Cycle and Manufacturing Supply Company (C. A.)	488
Owen, Attorney-General *v.*	253

P.

Palmer, Wyatt *v.* (C. A.)	106
Payne, Monckton *v.*	603
Pearson and I'Anson, In re	618
Penny *v.* Wimbledon Urban Council (C. A.)	72
Pocklington Steamship Company, Booker & Co. *v.*	690
Poole Corporation, Kinson Pottery Company *v.*	41
Prescott *v.* Lee (C. A.)	273
Pritchett *v.* English and Colonial Syndicate (C. A.)	428
Purves *v.* Straits of Dover Steamship Company (C. A.)	217

R.

Reg. *v.* Davey	301
—— *v.* Glamorgan County Council. Ex parte Miller	26
(C. A.)	536
—— *v.* Leicester Guardians	632
—— *v.* Nicholson (C. A.)	455
Rendall, Lane *v.*	673
Rhoades, In re. Ex parte Rhoades (C. A.)	347
River Ribble Joint Committee *v.* Halliwell (C. A.)	385
v. Shorrock (C. A.)	385
Roberts, Shoolbred *v.*	560
Roche *v.* London and South Western Railway Company (C. A.)	502

S.

	PAGE
Saffery, Ex parte. In re Vautin	549
Sharman *v.* Mason	679
Shaw *v.* Hertfordshire County Council (C. A.)	282
Shoolbred *v.* Roberts	560
Shorrock, River Ribble Joint Committee *v.* (C. A.)	385
Smith, Chandler *v.* (C. A.)	506
Smith - Marriott, Attorney-General *v.*	595
Snowden, Hubbard & Co., Hall *v.* (C. A.)	136
Softlaw *v.* Welch (C. A.)	419
Steamship Isis Company *v.* Bahr & Co. (C. A.)	364
Steiger, Horsey Estate, Limited *v.* (C. A.)	79
Straits of Dover Steamship Company, Purves *v.* (C. A.)	217
Street, Gordon *v.* (C. A.)	641

T.

Tankard, In re. Ex parte Official Receiver	57
Temperley Shipping Company, Anglo-Argentine Live Stock and Produce Agency *v.*	403
Thompson, Green *v.*	1
Tiedemann and Ledermann Frères, In re	66
Tweed, Ex parte (C. A.)	167
Tyler, Cameron *v.*	94

U.

Uckfield Rural Council *v.* Crowborough District Water Company	664
Union Credit Bank *v.* Mersey Docks and Harbour Board	205
United Ordnance and Engineering Company, Ex parte. In re Hooley	579

V.

Vautin, In re. Ex parte Saffery	549
Vicary, Anderson *v.*	436

W.

Walker, Hogarth *v.*	401
Walshaw *v.* Brighouse Corporation (C. A.)	286
Ward, Ex parte. In re Bullock	517
Warwick *v.* Graham	191
Weaver, Jeffrey *v.*	449
Welch, Softlaw *v.* (C. A.)	419
Westminster Vestry *v.* Hoskins	474
White *v.* Morley	34
Whitehaven Harbour Commissioners, Chambers *v.* (C. A.)	132
Williams *v.* Birmingham Battery and Metal Company (C. A.)	338
——— *v.* London and North Western Railway Company	197
——— *v.* Macdonald	308
Willoughby, Hyderabad (Deccan) Company *v.*	530
Wimbledon Urban Council, Penny *v.* (C. A.)	72
Wyatt *v.* Palmer (C. A.)	106

TABLE OF CASES CITED.

A.

		PAGE
Acton Local Board *v.* Batten	28 Ch. D. 283	45
Adams *v.* Bostock	8 Q. B. D. 259	274
Advocate-General *v.* Grant	15 D. 980	161
Allwood *v.* Harris	9 Times L. R. 14	675
Alps, The	[1893] P. 109	188
Andrews *v.* Dixon	3 B. & A. 645	569
Anon.	1 Atk. 103	573
Archer *v.* Willingrice	4 Esp. 186	123
Arnitt *v.* Garnett	3 B. & A. 440	569
Arnold *v.* Cheque Bank	1 C. P. D. 578	174
Ashwell's Will, In re	Joh. 112	256
Ashworth *v.* Outram	9 Ch. D. 483	491
Atkinson *v.* Fosbroke	L. R. 1 Q. B. 628	592
Attorney-General *v.* Beech	[1899] A. C. 53	241
——— *v.* Booth	63 L. J. (Q.B.) 356	242
——— *v.* Dorking Guardians	20 Ch. D. 595	46
——— *v.* Emerson	10 Q. B. D. 191	482
——— *v.* Fairiey	[1897] 1 Q. B. 698	261
——— *v.* London and North Western Railway Company	6 Q. B. D. 216	271
——— *v.* ———	5 Ex. D. 247	272
——— *v.* London Corporation	2 Mac. & G. 247	481
——— *v.* Newcastle-upon-Tyne Corporation	[1897] 2 Q. B. 384	479
——— *v.* Norwich Corporation	2 My. & Cr. 406	28
——— *v.* Pearson	2 Coll. 581	28
——— *v.* Siddon	1 C. & J. 220	161
——— *v.* Thompson	8 Hare, 106	482
Atwood *v.* Sellar	5 Q. B. D. 286	407
Audain, Ex parte	42 Ch. D. 1	584
Aylesford *v.* Great Western Railway Company	[1892] 2 Q. B. 626	422

B.

Badman, Ex parte	45 Ch. D. 16	70
Bailey *v.* Bailey	13 Q. B. D. 855	430
——— *v.* Johnson	L. R. 7 Ex. 263	589
Baker *v.* Oakes	2 Q. B. D. 171	104
Barlow, Re	30 L. J. (Q.B.) 271	635

		PAGE
Barnard, Ex parte	46 L. T. 24	100
Bater *v.* Birkenhead Corporation	[1893] 2 Q. B. 77	288
Beardsley *v.* Beardsley	[1899] 1 Q. B. 746	169
Beckett *v.* Tasker	19 Q. B. D. 7	421
Bellis *v.* Beal	2 Esp. 592	123
——— *v.* Burghall	2 Esp. 722	123
Bentham *v.* Hoyle	3 Q. B. D. 289	36
Bethell, In re	34 Ch. D. 561	605
Black *v.* Christchurch Finance Company	[1894] A. C. 48	75, 397
Blakey *v.* Latham	41 Ch. D. 518	499
Blyth and Fanshawe, In re	10 Q. B. D. 207	488
Bolton Partners *v.* Lambert	41 Ch. D. 295	69
Booker *v.* Taylor	*The Times*, Nov. 21, 1882	302
Boulter *v.* Kent Justices	[1897] A. C. 556	300, 462
Bowron, Baily & Co., In re	L. R. 3 Ch. 592	70
Boyd, In re	[1895] 1 Q. B. 611	432
Brall, In re	[1893] 2 Q. B. 381	60
Bramble *v.* Lowe	[1897] 1 Q. B. 283	634
Brewer *v.* Shepherd	36 J. P. 373	452
Bridges *v.* Miller	20 Q. B. D. 287	274
Brierley Hill Local Board *v.* Pearsall	9 App. Cas. 595	288
Brigden *v.* Heighes	1 Q. B. D. 330	452
Briggs *v.* Sowry	8 M. & W. 729	573
Brinsmead *v.* Harrison	L. R. 7 C. P. 547	74
Bristol Riots	3 State Trials, N.S. 1	28
Broad and Broad, In re	15 Q. B. D. 420	492
Brooker *v.* Wood	5 B. & Ad. 1052	296
Bruce *v.* Aylesbury (Marquess)	[1892] A. C. 356	263
Brydon *v.* Stewart	2 Macq. 30	312
Bulley *v.* Bulley	8 Ch. D. 479	169
Burge *v.* Brutton	2 Hare, 373	349
Burgess *v.* Equitable Marine Insurance Company	126 Mass. 70	530
Burnett *v.* Berry	[1896] 1 Q. B. 641	35
Byas *v.* Miller	3 Com. Cas. 39	69

C.

Carey *v.* Eccleston	Crawf. & Dix. Ab. C. 6	161
Carmichael *v.* Gee	5 App. Cas. 588	253
Carney *v.* Plimmer	[1897] 1 Q. B. 634	562
Carr *v.* Stringer	L. R. 3 Q. B. 433	676
Carter, Ex parte	8 Ch. D. 731	100
——— and Kenderdine's Contract, In re	[1897] 1 Ch. 776	60
Cartwright *v.* Regan	[1895] 1 Q. B. 900	519
Castner Kellner Alkali Company *v.* Commercial Development Corporation	[1899] 1 Ch. 803	491
Cates *v.* South	1 L. T. 365	452
Catlow *v.* Catlow	2 C. P. D. 362	169
Chatterton *v.* Watney	17 Ch. D. 259	430
Chinery, Ex parte	12 Q. B. D. 342	430
City and South London Railway Company *v.* London County Council	[1891] 2 Q. B. 513	668
Clarke *v.* Holmes	7 H. & N. 937	341
Clink *v.* Radford	[1891] 1 Q. B. 625	181
Clough *v.* London and North-Western Railway Company	L. R. 7 Ex. 26	349

		PAGE
Coats *v.* Inland Revenue Commissioners	[1897] 2 Q. B. 423; [1897] 1 Q. B. 778	656, 661
Coburn *v.* Colledge	[1897] 1 Q. B. 702	605
Cocker *v.* Musgrove	9 Q. B. 223	569
Cole *v.* Langford	[1898] 2 Q. B. 36	109
Colonial Bank *v.* Whinney	30 Ch. D. 261; 11 App. Cas. 426	681
Columbian Insurance Company *v.* Ashby	13 Peters, 331	362
Colyer *v.* Speer	2 B. & B. 67	571
Combe *v.* London Corporation	1 Y. & C. Ch. 631; 10 Jur. 57	482
Combined Weighing and Advertising Machine Company, In re	43 Ch. D. 99	428
Comfort *v.* Betts	[1891] 1 Q. B. 737	613
Commissioners of Police *v.* Cartman	[1896] 1 Q. B. 655	161
Compton, In re	30 Ch. D. 15	348
Congleton Corporation *v.* Pattison	10 East, 130	89
Coole *v.* Lovegrove	[1893] 2 Q. B. 44	280
Corn *v.* Matthews	[1893] 1 Q. B. 310	1
Couldery *v.* Bartrum	19 Ch. D. 394	552
Cowley (Earl) *v.* Inland Revenue Commissioners	[1899] A. C. 198	243
Crew *v.* Terry	2 C. P. D. 403	589
Croft *v.* Pyke	3 P. Wms. 180	350
Cundell *v.* Dawson	4 C. B. 376; 17 L. J. (C.P.) 311	96
Cundy *v.* Lindsay	3 App. Cas. 459	551

D.

Davies *v.* Harvey	L. R. 9 Q. B. 433	161
—— *v.* Parry	[1899] 1 Ch. 602	349
Davis *v.* Burton	11 Q. B. D. 537	519
Dawson *v.* Midland Railway Company	L. R. 8 Ex. 8	315
De Francesco *v.* Barnum	43 Ch. D. 165	4
De la Warr (Earl) *v.* Miles	19 Ch. D. 80	492
Diggle *v.* Higgs	2 Ex. D. 422	560
Dixon *v.* Wilks	9 Ir. C. L. Rep. 467	569
Doe *v.* David	1 C. M. & R. 405	85
—— *v.* Ingleby	15 M. & W. 465	85
—— *v.* Jackson	1 B. & C. 448	87
—— *v.* Stanion	1 M. & W. 695	87
Dovaston *v.* Payne	2 H. Bl. 527	315
Du Cane and Nettlefold's Contract, In re	[1898] 2 Ch. 96	248
Duck *v.* Braddyll	13 Price, 455; M'Cl. 217	571
—— *v.* Mayeu	[1892] 2 Q. B. 511	74
Durham Brothers *v.* Robertson	[1898] 1 Q. B. 765	614
Dynen *v.* Leach	26 L. J. (Ex.) 221	341

E.

Edmonds *v.* Watermen and Lightermen's Company	24 L. J. (M.C.) 124	36
Edwards *v.* Hope	14 Q. B. D. 922	500
—— *v.* Steel	[1897] 1 Q. B. 712; 2 Q. B. 327	217, 219
Emmerson *v.* Ind, Coope & Co.	33 Ch. D. 323	482

		PAGE
Errington *v.* Metropolitan District Railway Company	19 Ch. D. 559	655
Evans *v.* Ware	[1892] 3 Ch. 502	4

F.

Farnham, In re	[1895] 2 Ch. 799	60
Featherstone Riots	Home Office Papers, 1893, C. 7234	28
Fellows *v.* Wood	59 L. T. 513	4
Fielding *v.* Morley Corporation	[1899] 1 Ch. 1	285
Finch *v.* Blundell	5 L. T. 672	452
Finney *v.* Tootel	17 L. J. (C.P.) 158	161
Fisher *v.* Howard	34 L. J. (M.C.) 42	310
——— *v.* Roberts	6 Times L. R. 354	174
Fletcher *v.* Nokes	[1897] 1 Ch. 271	84
Flinn & Sons, Ex parte	[1899] 2 Q. B. 154	608
Flower *v.* Lloyd	6 Ch. D. 297; 10 Ch. D. 327	109
Ford, Ex parte	1 Ch. D. 521	682
Fordom *v.* Parsons	[1894] 2 Q. B. 780	46
Foster *v.* Bates	12 M. & W. 226	69
——— *v.* Inland Revenue Commissioners	[1894] 1 Q. B. 516	556
Fraser, In re	[1892] 2 Q. B. 633	146
Freeman *v.* Newman	12 Q. B. D. 373	274
Freer *v.* Murray	[1894] A. C. 576	608
French *v.* Gerber	1 C. P. D. 737	189
Fryer, Ex parte	3 Mor. 231	63

G.

Gardner *v.* Trechmann	15 Q. B. D. 154	182
Gas Light and Coke Company *v.* Holloway	52 L. T. 434	623
Geen *v.* Newington Vestry	[1898] 2 Q. B. 1	45
Gerard (Lord), In re	[1895] 1 Q. B. 459	655
Gethin *v.* Wilks	2 Dowl. 189	571
Gilbert, In re	[1898] 1 Q. B. 282	349
Glaholm *v.* Barker	L. R. 2 Eq. 598	503
Godfrey *v.* George	[1896] 1 Q. B. 48	431
Grant *v.* Astle	2 Doug. 722	605
——— *v.* Coverdale	9 App. Cas. 470	366
Gray *v.* Pullen	5 B. & S. 970	74
Graydon, In re	[1896] 1 Q. B. 417	561
Great Western Railway Company *v.* Bailie	5 B. & S. 928	676
——— *v.* Inland Revenue Commissioners	[1894] 1 Q. B. 507	656
Green *v.* Austin	3 Camp. 260	574
Greer *v.* Young	24 Ch. D. 545	169
Gregory *v.* Tuffs	6 C. & P. 271	123
Gresham Life Assurance Society *v.* Styles	[1892] A. C. 309	236
Griffiths *v.* London and St. Katherine Docks	13 Q. B. D. 259	340

H.

		PAGE
Hall *v.* Green	23 L. J. (M.C.) 15	123
—— *v.* Snowden, Hubbard & Co.	[1899] 1 Q. B. 136	143
Hallett, In re	1 Manson, 380	585
Hallett's Estate, In re	13 Ch. D. 696	119
Hammond *v.* Hockin	12 Q. B. D. 291	519
——— *v.* Reid	4 B. & A. 72	531
Hansen *v.* Harrold Brothers	[1894] 1 Q. B. 612	181
Hardaker *v.* Idle District Council	[1896] 1 Q. B. 335	75, 396
Harris, Ex parte	2 Ch. D. 423	63
——— *v.* Allwood	57 J. P. 7; 9 Times L. R. 14	675
——— *v.* Harris	4 Hare, 179	482
——— *v.* Truman	9 Q. B. D. 264	557
Harrison and Bottomley, In re	[1899] 1 Ch. 465	168
——— *v.* Harrison	13 P. D. 180	422
——— *v.* Rutland (Duke)	[1893] 1 Q. B. 142	315
Hasluck *v.* Clark	[1899] 1 Q. B. 699	350
Hastings Corporation *v.* Ivall	L. R. 8 Ch. 1017	482
Hawkins, In re	[1894] 1 Q. B. 25	63
———, In re	[1895] 1 Q. B. 404	146
——— *v.* Sherman	3 C. & P. 459	151
Hayward *v.* Raw	6 H. & N. 308	604
Henchett *v.* Kimpson	2 Wils. 140	571
Hill *v.* Hall	45 L. J. (M.C.) 153	667
Hobart *v.* Hammond	4 Rep. 27 b	604
Holden, In re	20 Q. B. D. 43	60
Hole *v.* Sittingbourne and Sheerness Railway Company	6 H. & N. 488	398
Holiday *v.* Hicks	Cro. Eliz. 638	113
Holtby *v.* Hodgson	24 Q. B. D. 103	420
Hood Barrs *v.* Cathcart	[1894] 2 Q. B. 559	421
——— *v.* Heriot	[1896] A. C. 174	421
Hornsby *v.* Raggett	[1892] 1 Q. B. 20	382
Horwood *v.* Smith	2 T. R. 750	118
Hoskins *v.* Pickersgill	3 Doug. 222	402
Howell Thomas, In re	[1893] 1 Q. B. 670	104
Hudson, In re	1 L. R. Ir. 6	572
——— *v.* Ede	L. R. 2 Q. B. 566; 3 Q. B. 412	366
Hughes *v.* Percival	8 App. Cas. 443	397
——— *v.* Wavertree Local Board	10 Times L. R. 357; 58 J. P. 654	675
Humphrey *v.* Earle	20 Q. B. D. 294	274
Hunt *v.* Fripp	[1898] 1 Ch. 675	561
Hutchinson *v.* Gillespie	11 Ex. 798	432
Hutton, In re	14 Q. B. D. 301	561

I.

Inland Revenue Commissioners *v.* Angus	23 Q. B. D. 579	11
Inman Steamship Company *v.* Bischoff	7 App. Cas. 670	182
Irons *v.* Davis	[1899] 2 Q. B. 330	509
Izod, In re	[1898] 1 Q. B. 241	588

J.

James, Ex parte	L. R. 9 Ch. 609	355
——— *v.* Howarth	5 C. P. D. 225	274

		PAGE
Jay *v.* Hammon	27 L. J. (M.C.) 25	475
—— *v.* Robinson	25 Q. B. D. 467	421
Jefferson *v.* Richardson	35 J. P. 470	451
Johnson *v.* Croydon Corporation	16 Q. B. D. 708	35
Jones *v.* Farrell	1 De G. & J. 208	430
—— *v.* Ocean Coal Company	[1899] 2 Q. B. 124	523
—— *v.* Victoria Dock Company	2 Q. B. D. 314	416
—— *v.* Walters	62 J. P. 374	36
—— *v.* Williams	2 M. & W. 326	482
Joy *v.* Campbell	1 Sch. & Lef. 328	681

K.

Keast *v.* Barrow Hæmatite Steel Company	15 Times L. R. 141	126, 524
Kensington *v.* Chantler	2 M. & S. 36	61
Kerr *v.* Kerr	[1897] 2 Q. B. 439	63, 431
Kibble, Ex parte	L. R. 10 Ch. 373	146
Kirkheaton Local Board *v.* Ainley	[1892] 2 Q. B. 274	46
—— —— *v.* Beaumont	52 J. P. 68	45
Kleinwort, Sons & Co. *v.* Comptoir National d'Escompte de Paris	[1894] 2 Q. B. 157	174
Knight of St. Michael, The	[1898] P. 30	358
Knowles' Settled Estates, In re	27 Ch. D. 707	248
Kruse *v.* Johnson	[1898] 2 Q. B. 91	35

L.

Lacave & Co. *v.* Crédit Lyonnais	[1897] 1 Q. B. 148	173
Laceby *v.* Lacon & Co.	[1899] A. C. 222	467
Lacey, In re	13 Q. B. D. 128	549
Langdale, Ex parte	19 W. R. 951	63
Langdon *v.* Wilson	2 Man. & R. 10	161
Last *v.* London Assurance Corporation	10 App. Cas. 438	439
Lee *v.* Lopes	15 East, 230	571
—— *v.* Nuttall	12 Ch. D. 61.	351
Lennox, In re	16 Q. B. D. 315	146
Leslie *v.* Fitzpatrick	3 Q. B. D. 229	3
Lester & Co., Ex parte	[1893] 2 Q. B. 113	422
Levene, Ex parte	[1895] 1 Q. B. 328	422
Lilley, In re	[1892] 1 Q. B. 759	103
Lingard *v.* Messiter	1 B. & C. 308	682
Lockhart *v.* St. Albans Corporation	21 Q. B. D. 188	675
London and Blackwall Railway Company *v.* Limehouse Board of Works	26 L. J. (Ch.) 164	668
London and North Western Railway Company *v.* Llandudno Improvement Commissioners	[1897] 1 Q. B. 287	202
London and South Western Railway Company *v.* James	L. R. 8 Ch. 241	503
London County Council *v.* Grove	3 Tax Cases, 508	236
Lopes, In re	6 Mor. 245	146
Lowth *v.* Ibbotson	[1899] 1 Q. B. 1003	134

M.

M'Carthy, In re	7 L. R. Ir. 473	566
McWilliam *v.* Dawson	56 J. P. 182	382

		PAGE
Manchester, Sheffield and Lincolnshire Railway Company *v.* Barnsley Union	67 L. T. 119	280
——— Railway Company *v.* Wallis	14 C. B. 213	315
Marks *v.* Benjamin	5 M. & W. 565	123
Mathews *v.* Brown & Co.	63 L. J. (Q.B.) 494	173
Mathiessen *v.* London and County Bank	5 C. P. D. 7[illegible]	174
May, In re	45 Ch. D. 499	350
——— *v.* Angeli	13 Times L. R. 869	557
Meader *v.* West Cowes Local Board	[1892] 3 Ch. 18	48
Meakin *v.* Morris	12 Q. B. D. 352	2
Mellors *v.* Shaw	1 B. & S. 437	340
Membery *v.* Great Western Railway Company	14 App. Cas. 179	341
Mercer *v.* Vans Colina	67 L. J. (Q.B.) 424	561
Merchant Shipping Company *v.* Armitage	L. R. 9 Q. B. 99	181
Mersey Docks *v.* Lucas	8 App. Cas. 891	445
Midland Railway Company *v.* Miles	30 Ch. D. 634	655
Miller *v.* Dell	[1891] 1 Q. B. 468	604
——— *v.* Race	1 Burr. 452; 1 Sm. L. C. 10th ed. 447	113
Minet *v.* Morgan	L. R. 8 Ch. 361	482
Moore *v.* Anglo-Italian Bank	10 Ch. D. 681	553
Moorhouse *v.* Woolfe	46 L. T. 374	651
Morris *v.* Edwards	15 App. Cas. 309	478
Muirhead, Ex parte	2 Ch. D. 22	63
Mullins *v.* Surrey Treasurer	7 App. Cas. 1	538
Mundy and Roper's Contract, In re	[1899] 1 Ch. 275	248, 256

N.

Nathan, In re	12 Q. B. D. 461	634
National Bank *v.* Silke	[1891] 1 Q. B. 435	174
Nereid, The	14 P. D. 78	503
New York Life Insurance Company *v.* Styles	14 App. Cas. 381	439
Newby *v.* Eckersley	[1899] 1 Q. B. 465	623
Newman, In re	3 Ch. D. 494	63
Newton, In re	[1896] 2 Q. B. 403	553
North Metropolitan Tramways Company *v.* London County Council	[1898] 2 Ch. 145	285
Norton *v.* Gregory	73 L. T. 10	432
Notting Hill, The	9 P. D. 105	411
Nottingham and Nottinghamshire Bank, Ex parte	15 Q. B. D. 441	681

O.

Onslow *v.* Inland Revenue Commissioners	25 Q. B. D. 465	285
Oriental Bank, In re	28 Ch. D. 634	83
Owen *v.* Wynn	9 Ch. D. 29	486

P.

Palgrave *v.* Windham	1 Str. 212	574
Palliser *v.* Gurney	19 Q. B. D. 519	422

		PAGE
Parnham's Trusts, In re	L. R. 13 Eq. 413	588
Parsons *v.* Alexander	5 E. & B. 263	562
Paterson *v.* Wallace	1 Macq. 748	341
Patterson *v.* Patterson	L. R. 2 P. & M. 189	63
Paxton, In re	60 L. T. 428	519
Peache *v.* Colman	L. R. 1 C. P. 324	310
Pearson *v.* Holborn Union Assessment Committee	[1893] 1 Q. B. 389	475
Peck *v.* Ray	[1894] 3 Ch. 282	592
Pelton *v.* Harrison	[1891] 2 Q. B. 422; [1892] 1 Q. B. 118	421, 426
Penn *v.* Alexander	[1893] 1 Q. B. 522	310
Penny *v.* Wimbledon Urban Council	[1898] 2 Q. B. 212; [1899] 2 Q. B. 72	397
Phillips *v.* Irving	7 M. & G. 325	532
——— *v.* Morrison	13 L. J. (Ex.) 212	599
Philpott *v.* Lehain	35 L. T. 855	432
Pickard *v.* Smith	10 C. B. (N.S.) 470	74
Pike *v.* Fitzgibbon	17 Ch. D. 454	420
Pirie *v.* Middle Dock Company	44 L. T. 426	361
Player, In re	15 Q. B. D. 682	57
Plumbly, In re	13 Ch. D. 667	557
Pountney *v.* Clayton	11 Q. B. D. 820	655
Powell *v.* Brown	[1899] 1 Q. B. 157	135, 139
——— *v.* Kempton Park Racecourse Company	[1899] A. C. 143; [1897] 2 Q. B. 242	382
Price *v.* Marsden	[1899] 1 Q. B. 493	126, 524
Priestley *v.* Pratt	L. R. 2 Ex. 101	682
Priestman *v.* Thomas	9 P. D. 210	109
Pulsford *v.* Richards	22 L. J. (Ch.) 559	646

Q.

Quartz Hill Gold Mining Company *v.* Eyre	11 Q. B. D. 674	109

R.

Ramsgate Victoria Hotel Company *v.* Montefiore	L. R. 1 Ex. 109	70
Reedie *v.* London and North Western Railway Company	4 Ex. 244	396
Reg. *v.* Allmey	35 J. P. 534	296
—— *v.* Bangor Corporation	18 Q. B. D. 349	641
—— *v.* Bowman	[1898] 1 Q. B. 663	300, 466
—— *v.* Cotham	[1898] 1 Q. B. 802	300, 459
—— *v.* De Rutzen	1 Q. B. D. 55	460
—— *v.* Gamble	11 Ad. & E. 69	634
—— *v.* Hassall	L. & C. 58; 30 L. J. (M.C.) 175	119
—— *v.* Herts Justices	50 L. J. (M.C.) 121; 7 Q. B. D. 542	608
—— *v.* Keighley Union	39 J. P. 309; 40 J. P. 70	634
—— *v.* Kensington	12 Q. B. 654	296
—— *v.* Lewisham Union	[1897] 1 Q. B. 498	634
—— *v.* London and North Western Railway Company	[1894] 2 Q. B. 512	655
—— *v.* London School Board	17 Q. B. D. 738	21

		PAGE
Reg. *v.* Lord	12 Q. B. 757	3
—— *v.* Manchester Justices	[1899] 1 Q. B. 571	296, 459
—— *v.* Moore	7 Q. B. D. 542	608
—— *v.* Norwich and Brandon Railway Company	3 D. & L. 385	635
—— *v.* Overton	1 Dears. 308	160
—— *v.* Pirehill Justices	49 J. P. 453	459
—— *v.* Sharman	[1898] 1 Q. B. 578	458
—— *v.* Surrey Justices	L. R. 5 Q. B. 466	470
—— *v.* Tynemouth Rural Council	[1896] 2 Q. B. 451	46
—— *v.* West Middlesex Waterworks	1 E. & E. 716; 28 L. J. (M.C.) 135	23
—— *v.* West Riding Justices	[1898] 1 Q. B. 503	300
Rex *v.* Bank of England	2 Doug. 524	634
—— *v.* Canterbury (Archbishop)	15 East, 117	635
—— *v.* Essex (Inhabitants)	4 T. R. 591	28, 538
—— *v.* Fowey Corporation	2 B. & C. 584	634
—— *v.* Hunter	2 Lea. 624	160
—— *v.* Kennett	5 C. & P. 282	537
—— *v.* Pinney	3 State Trials (N.S.) 1; 5 C. & P. 254	537
—— *v.* Stanton	7 C. & P. 431	114
—— *v.* Tower Hamlets Commissioners of Sewers	1 B. & Ad. 232	28
Ricketts *v.* East and West India Docks Railway Company	12 C. B. 160	315
Riseley *v.* Ryle	11 M. & W. 16	574
Robinson *v.* Mollett	L. R. 7 H. L. 802	557
———— *v.* Sunderland Corporation	[1899] 1 Q. B. 751	303
Roe *v.* Galliers	2 T. R. 133	85
—— *v.* Hayley	12 East, 464	85
—— *v.* Sales	1 M. & S. 297	87
Rogers, In re	[1894] 1 Q. B. 425	561
Russell *v.* Knight	The Times, May 9, 1894	47
Ryall *v.* Rowles	1 Ves. Sen. 348	681

S.

Sacker, Ex parte	22 Q. B. D. 179	63
St. Mary, Newington *v.* Jacobs	L. R. 7 Q. B. 47	316
Salford Corporation *v.* Lancashire County Council	25 Q. B. D. 384	538
Sander *v.* Heathfield	L. R. 19 Eq. 21	351
Scattergood *v.* Silvester	15 Q. B. 506	114, 551
Scholfield *v.* Londesborough (Earl)	[1896] A. C. 514	211
Scott *v.* Morley	20 Q. B. D. 120	419
Seccomb *v.* Provincial Insurance Company	92 Mass. 305	531
Serle, In re	[1898] 1 Ch. 652	84
Seymour *v.* Maddox	16 Q. B. 326	341
Shepherd *v.* Kottgen	2 C. P. D. 585	360
Sheppard *v.* Phillimore	L. R. 2 P. C. 450	634
Sherras *v.* De Rutzen	1 Q. B. 918	161
Shutt *v.* Lewis	5 Esp. 128	123
Simmonds, Ex parte	16 Q. B. D. 308	355
Simonds *v.* Blackheath Justices	17 Q. B. D. 765	609
Skipp *v.* Eastern Counties Railway Company	9 Ex. 223	341

		PAGE
Smeeton *v.* Collier	1 Ex. 457	104
Smith *v.* Baker	[1891] A. C. 325	338
—— *v.* Chandler	22 Q. B. D. 208	274
—— *v.* Great Western Railway Company	3 App. Cas. 165	655
	[1891] 2 Q. B. 394	85, 588
—— *v.* Gronow	54 L. T. 422	437
—— *v.* Hunt	7 H. L. C. 750	646
—— *v.* Kay	9 Ex. 161	151
—— *v.* Peat	3 Ch. D. 49	414
—— *v.* Webster	9 Ch. D. 223	647
—— *v.* Wheatcroft		
South American and Mexican Company, In re	[1895] 1 Ch. 37	285
South Wales Railway Company *v.* Swansea Local Board of Health	4 E. & B. 189; 24 L. J. (M.C.) 30	202
Southampton Steam Colliery Company *v.* Clarke	L. R. 4 Ex. 73; 6 Ex. 53	377
Spawforth *v.* Alexander	2 Esp. 621	160
Stapleton, Ex parte	10 Ch. D. 586	566
Stern *v.* Sevastopulo	14 C. B. (N.S.) 737	592
Stevens *v.* Copp	L. R. 4 Ex. 20	83
Stogdon *v.* Lee	[1891] 1 Q. B. 661	422
Stops *v.* Northamptonshire Justices	4 Times L. R. 78	28
Strachan, In re	4 Ch. D. 123	557
Strickland *v.* Hayes	[1896] 1 Q. B. 290	35
Swan *v.* North British Australasian Company	2 H. & C. 175	210

T.

Tancred *v.* Delagoa Bay Railway Company	23 Q. B. D. 239	613
Taxation Commissioners *v.* Teece	[1899] A. C. 254	599
Taylor *v.* Plumer	3 M. & S. 562	114, 557
Tennant *v.* Cumberland	1 E. & E. 401	451
——— *v.* Smith	[1892] A. C. 150	599
Tetley *v.* Griffith	57 L. T. 673; 36 W. R. 96	425
Thackthwaite *v.* Cock	3 Taunt. 487	682
Thomas *v.* Mirehouse	19 Q. B. D. 563	575
——— *v.* Quartermaine	18 Q. B. D. 685	341
Thompson *v.* Greig	34 J. P. 214	452
Thurman *v.* Wild	11 Ad. & E. 453	74
Tollemache, In re	13 Q. B. D. 720	146
Tomkins *v.* Saffery	3 App. Cas. 213	557
Topley *v.* Corsbie	20 Q. B. D. 350	519
Travis *v.* Uttley	[1894] 1 Q. B. 233	45
Trimble *v.* Hill	5 App. Cas. 342	561
Tunney *v.* Midland Railway Company	L. R. 1 C. P. 291	321
Turner *v.* Hutchinson	2 F. & F. 185	624
Turner & Co. *v.* Culpan	36 W. R. 278	519
Tynemouth Corporation *v.* Attorney-General	[1899] A. C. 307	300

V.

Vansittart, In re	[1893] 1 Q. B. 181	57
Varley *v.* Coppard	L. R. 7 C. P. 505	89
Vera Cruz, The	10 App. Cas. 59	503

		PAGE
Vernon *v.* Smith	5 B. & A. 1	85
Vinter *v.* Hind	10 Q. B. D. 63	303
Vyvyan *v.* Arthur	1 B. & C. 410	85

W.

Wadling *v.* Oliphant	1 Q. B. D. 145	561
Wadsworth, In re	34 Ch. D. 155	499
Wale *v.* Inland Revenue Commissioners	4 Ex. D. 270	599
Walker *v.* Witter	1 Doug. 1	430
Waring *v.* Dewberry	1 Str. 97	574
Watkins, Ex parte	L. R. 8 Ch. 520	682
Watling *v.* Oastler	L. R. 6 Ex. 73	340
Waye *v.* Thompson	15 Q. B. D. 342	288, 303
Weardale Coal and Iron Company *v.* Hodson	[1894] 1 Q. B. 598	519
Weeks *v.* Gore	Unreported	350
West *v.* Dobb	L. R. 4 Q. B. 634; 5 Q. B. 460	84
West London Syndicate *v.* Inland Revenue Commissioners	[1898] 2 Q. B. 507; [1898] 1 Q. B. 226	11, 12
West of England Bank, In re	12 Ch. D. 288	584
Westmoreland Green and Blue Slate Company *v.* Feilden	[1891] 3 Ch. 15	430
Wharton *v.* Naylor	12 Q. B. 673	569
Wheatcroft *v.* Matlock Local Board	52 L. T. 356	45
White *v.* Chitty	L. R. 1 Eq. 372	588
——— *v.* Garden	10 C. B. 919	174, 552
——— *v.* Redfern	5 Q. B. D. 15	303
Whitecross Wire Company *v.* Savill	8 Q. B. D. 653	360
Whitfield *v.* Brand	16 M. & W. 282	682
——— *v.* Hunt	2 Doug. 727 b	605
Whittaker *v.* Kershaw	45 Ch. D. 320	422
Wiesener *v.* Rackow	76 L. T. 448	615
Williams, In re	8 Morrell, 65	349
———, In re	25 Ch. D. 656	519
——— *v.* Earle	L. R. 3 Q. B. 739	89
Wilson *v.* Coxwell	23 Ch. D. 764	348
——— *v.* Tumman	6 M. & G. 236	69
Wintle *v.* Freeman	11 Ad. & E. 539	569
Wood, In re	28 L. T. 174	557
——— *v.* Chandler	20 Q. B. D. 297	274
——— *v.* Wood	L. R. 1 P. & M. 467	63
Woodham *v.* Atlantic Transport Company	[1899] 1 Q. B. 15	143
Woodley *v.* Metropoliten District Railway Company	2 Ex. D. 384	341
Woodward *v.* Darcy	1 Plowd. 185 a	349
Woolford's Estate *v.* Levy	[1892] 1 Q. B. 772	56

Y.

Yarmouth *v.* France	19 Q. B. D. 647	340
Yates *v.* Ratledge	5 H. & N. 249	569
Young *v.* Grote	4 Bing. 253	210

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1898. 1899.

GREEN *v.* THOMPSON.

1899
May 1.

Infant—Apprenticeship Deed—Contract not for Benefit of Infant—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90).

By a deed of apprenticeship of an infant it was provided that the apprentice should serve for a term of years, excepting the usual holidays and days on which the master's business should be at a standstill through accident beyond the control of the master, and that during the said term, excepting and subject as aforesaid, the master should pay the apprentice wages for her services :—

Held, that the provision that the master should not be liable to pay wages to the apprentice during the excepted period was not so disadvantageous to her as to render the apprenticeship deed incapable of being enforced against her under the Employers and Workmen Act, 1875.

Corn v. *Matthews*, [1893] 1 Q. B. 310, distinguished.

CASE stated by justices for the county of Derby.

The appellant was a manufacturer of earthenware carrying on business at Church Gresley. The respondent, who was an infant and lived with her parents, was an apprentice to the

1899

GREEN v. THOMPSON.

appellant. On November 29, 1898, the appellant made a complaint against the respondent under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), whereby he claimed an order directing the respondent to perform her duties under the deed of apprenticeship executed by her. By the said deed, dated April 6, 1896, Lucy Thompson (the respondent), being then of the age of sixteen years, bound herself apprentice to the appellant to learn the branch of the potter's art called decorating, and to serve as an apprentice from April 6, 1896, for the term of five years, "excepting the usual holidays and days on which the said branch of the business of her said master shall be at a standstill through accident beyond the control of the master"; and the appellant covenanted that he would "during the said term (excepting and subject as aforesaid) teach and instruct the said apprentice . . . . and pay the said apprentice for her work and services such wages" as therein specified. The respondent worked as an apprentice under the deed until October, 1898, when she absented herself from work and remained absent thereafter.

It was admitted by the appellant that, having regard to the words "excepting the usual holidays and days on which the said branch of the business of her said master shall be at a standstill through accident beyond the control of the master," if the works were stopped by strikes the respondent would not be paid wages or taught during the time they were so stopped. It was objected on behalf of the respondent that the deed was invalid, on the ground that it was unfair to her that the appellant should not be liable to pay her any wages or teach her or find her work so long as the business was stopped from causes independent of any act of hers. And the cases of *Meakin* v. *Morris* (1) and *Corn* v. *Matthews* (2) were relied on in support of the objection. The justices held that the objection was well grounded and dismissed the complaint, subject to a case for the opinion of the Court.

Hextall, for the appellant. The contract was valid and binding on the apprentice. The conditions upon which the master

(1) (1884) 12 Q. B. D. 352. (2) [1893] 1 Q. B. 310.

was to be allowed to cease paying wages were not unfair or such as to render the contract as a whole disadvantageous to the infant. Here the master was only to be excused from paying wages if the works stopped from some cause outside his control, such as a strike. It is on this ground that the cases relied on below, *Meakin* v. *Morris* (1) and *Corn* v. *Matthews* (2), are to be distinguished. In both those cases the master was by the terms of the deed not to be liable to pay wages in the event of the business being interrupted by a "turn-out," and in the latter case it was admitted that that expression includes a lock-out which is the act of the master, and as far back as 1848, in *Reg.* v. *Lord* (3), it was laid down by Lord Denman that an agreement which "leaves the master free to stop his work and his wages whenever he chooses to do so cannot be considered as beneficial to the servant." In *Corn* v. *Matthews* (2) Lindley L.J. says (4): "I attach great importance myself to the fact that a turn-out includes a lock-out. If the proviso were addressed to a state of things over which the master might have no control, such as a strike, I think the case would not be so clear." In *Leslie* v. *Fitzpatrick* (5) it was held that there was nothing inequitable in a contract of service by an infant containing a provision that if the employers were compelled to stop their works in consequence of strikes, or from any other cause over which they had no control, they might terminate the agreement upon giving a fourteen days' notice. Lush J. there said: "If such provisions were at the time common to labour contracts, or were in the then condition of trade such as the master was reasonably justified in imposing as a just measure of protection to himself, and if the wages were a fair compensation for the services of the youth, the contract is binding, inasmuch as it was beneficial to him by securing to him permanent employment, and the means of maintaining himself." That passage has no doubt been adversely criticised by Lord Coleridge obiter in *Meakin* v. *Morris* (6), but it has since *Meakin* v. *Morris* (1) been

(1) 12 Q. B. D. 352.
(2) [1893] 1 Q. B. 310.
(3) 12 Q. B. 757.
(4) [1893] 1 Q. B. at p. 316.
(5) (1877) 3 Q. B. D. 229.
(6) 12 Q. B. D. at p. 355.

1899

GREEN v. THOMPSON.

followed with approval in *Fellows* v. *Wood*. (1) In considering whether a contract is binding on an infant as being beneficial to him, no distinction is to be drawn between an indenture of apprenticeship and a contract of service of any other kind: *Evans* v. *Ware* (2); *De Francesco* v. *Barnum*. (3)

Dwyer, for the respondent. The case is governed by *Meakin* v. *Morris* (4) and *Corn* v. *Matthews*. (5) Those cases are not distinguishable on the ground suggested by the appellant. In the latter case Lindley L.J. was the only member of the Court who drew any distinction in this respect between a strike and a lock-out, and he did not go further than saying that in the case of a proviso addressed to a strike "the case would not be so clear." The true question is, not whether the stoppage of work is attributable to a cause within the control of the master, but whether it is attributable to a cause outside the control of the apprentice. Lord Esher there says (6) that where the master "reserves to himself the right (under peculiar circumstances which are wholly independent of any act of the apprentice) to . . . . insist that the apprentice . . . . shall not be paid wages," the stipulation vitiates the contract. And (7) he adds as the ground of his decision: "But then the master puts into the contract a stipulation which enables him, if other workmen offend him, although the apprentice has nothing to do with that offence, to refuse to pay wages to the infant." But if that is the ground of that decision it is equally applicable to a proviso for stopping payment during a strike as during a lock-out, for the one is as much outside the control of an apprentice as the other. And in *Meakin* v. *Morris* (4) it was expressly held that the deed was bad, although the payment of wages was only to be suspended in the event of a strike. The word used there was the same as that in *Corn* v. *Matthews* (5), namely, "turn-out." But whereas in the latter case it was admittedly intended by the parties to include a lock-out, in *Meakin* v. *Morris* (4), it is plain from the language

(1) (1888) 59 L. T. 513.
(2) [1892] 3 Ch. 502.
(3) (1889) 43 Ch. D. 165.
(4) 12 Q. B. D. 352.
(5) [1893] 1 Q. B. 310.
(6) [1893] 1 Q. B. at p. 314.
(7) [1893] 1 Q. B. at p. 315.

of the deed and the statement of the case that the term "turn-out" was there used in contradistinction to a "lock-out," and as meaning only a strike.

DARLING J. I am of opinion that this appeal must be allowed. The respondent, who was an infant, bound herself to serve as an apprentice to the appellant in a certain branch of his business for a term of five years, "excepting the usual holidays and days on which the said branch of the business of her said master shall be at a standstill through accident beyond the control of the master." And it was stipulated that she should be paid certain wages "during the said term excepting and subject as aforesaid." It was contended on her behalf that that provision that the master might discontinue the payment of wages during the excepted period was disadvantageous to her, and rendered the whole deed of apprenticeship void, and a passage in Lord Coleridge's judgment in *Meakin* v. *Morris* (1) was relied on in support of that contention. If Lord Coleridge meant that a contract with an infant is void unless every single stipulation is to the infant's advantage, I can only say that in my opinion that view is not in accordance with the general current of authority. There must in every contract with an infant be one or more clauses which, standing by themselves, would not be to the infant's advantage. I think the true rule is that laid down by A. L. Smith L.J. in *Corn* v. *Matthews* (2), "that if there be a stipulation in the contract entered into by an infant so much to the detriment of the infant as to render it unfair that the infant should be bound by it, then the deed cannot be enforced at all." Then does the stipulation complained of here come within that rule? I think not. The payment of wages is only to be suspended during such time as the master is unable to supply her with work owing to causes beyond his control. That is the very case which Lindley L.J. was careful to distinguish in *Corn* v. *Matthews* (3), where he said: "If the proviso were addressed to a state of things over which the master might have no control, such as a

(1) 12 Q. B. D. 352. (2) [1893] 1 Q. B. 310, at p. 316.
(3) [1893] 1 Q. B. 310.

1899

GREEN v. THOMPSON.

Darling J.

strike, I think the case would not be so clear." From the importance which he attached to the fact that in that case the master was entitled to stop the payment of wages in the event of a lock-out—a state of things which would be the result of his own act—it is evident that the inclination of his opinion was in favour of the view that such a stipulation as the present would not avoid the contract. It is to be observed that the respondent is not precluded by the terms of the deed from seeking employment elsewhere during the accidental stoppage of the works.

CHANNELL J. I am of the same opinion. I think that upon the authorities it is clear that the true question is whether the particular stipulation complained of is so unfair as to make the entire contract disadvantageous to the infant. You may find in any contract a clause which by itself is not to the advantage of the infant; but that is not enough: the contract as a whole must be disadvantageous. This is exactly the kind of stipulation which was contemplated by Lindley L.J. in *Corn* v. *Matthews* (1) as one by which an infant would be bound. The excepted period during which the master is to be excused from paying wages is limited to the time during which the works are stopped by accidents beyond his control. I think the matter is sufficiently clear to leave no doubt as to which way it ought to be decided. Indeed, it may be that no master would take an apprentice on any other terms.

Appeal allowed.

Solicitors for appellant: *Andrew, Wood & Purves, for Dewes & Musson, Ashby-de-la-Zouch.*

Solicitor for respondent: *Thatcher, for Timms, Swadlincote.*

(1) [1893] 1 Q. B. 310.

J. F. C.

CHESTERFIELD BREWERY COMPANY *v.* COMMISSIONERS OF INLAND REVENUE.

1898
Dec. 16.

Revenue—Stamp—Conveyance on Sale—Declaration of Trust—Agreement for Sale of Equitable Interest—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 59.

The shareholders of the A. company, which was then in course of being voluntarily wound up, entered into an agreement in writing with the B. company whereby it was agreed that the shareholders of the A. company should respectively exchange their shares in the A. company for shares in the B. company, and that upon the B. company allotting to them the shares to which they were respectively entitled they should thenceforth hold their respective shares in the A. company in trust for the B. company:—

Held, by Wills and Bruce JJ., that the agreement amounted to a declaration of trust, and as such to a "conveyance on sale" to the B. company of an equitable interest in the shares of the A. company within the meaning of s. 54 of the Stamp Act, 1891, and was chargeable with an ad valorem duty accordingly:

Held, also, by Wills J., that it was an agreement for the sale of an equitable interest in property within the meaning of s. 59.

CASE stated by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

On December 22, 1897, an instrument, of which the following is a copy, was presented on behalf of the appellants to the respondents under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the respondents as to the stamp duty with which the said instrument was chargeable:—

"An agreement made the 4th day of December 1897 between Robert William Mills Nesfield . . . . Samuel Burkitt . . . . maltster William Wynne Jeudwine . . . . land agent Robert Fenwick Mills . . . . brewer the said Robert Fenwick Mills and William Forster Mills as executors of the will of M. F. Mills . . . . deceased the said William Forster Mills (in his own right) William Burkitt . . . . maltster and Richard Tesdale Dewe . . . . brewer of the Chesterfield Brewery Company registered in 1884 as an unlimited company (hereinafter called 'the old company') of the one or first part and the Chesterfield Brewery Company Limited (incorporated in 1897 and hereinafter called 'the new

1898

CHESTERFIELD BREWERY COMPANY v. INLAND REVENUE COMMISSIONERS.

company') of the other or second part. Whereas the old company was constituted by a deed of settlement dated the 25th day of March 1884 and afterwards in the same year registered as an unlimited company under the Companies Acts 1862 to 1883 with a nominal capital of 100,000*l.* divided into 1000 shares of 100*l.* each. And whereas 800 only of the said shares have been issued and the same are all fully paid up and are held by the parties hereto of the first part. And whereas the old company is in course of being voluntarily wound up and the said Robert Fenwick Mills is the liquidator for such purpose. And whereas the new company has been incorporated under the Companies Acts 1862 to 1893 with a nominal capital of 200,000*l.* divided into 1000 preference shares of 100*l.* each and 1000 ordinary shares of 100*l.* each. And whereas it is desirable that the shareholders in the old company shall acquire shares in the new company in manner hereinafter provided. Now it is hereby agreed as follows:—

"1. The parties hereto of the first part shall respectively exchange their respective shares in the old company for such number or amount of fully paid-up ordinary shares and fully paid-up preference shares in and debenture stock of the new company as are respectively set opposite their respective names in the schedule hereto. The new company shall also pay to each of the seven parties hereto (but as to the said Richard Fenwick Mills and William Forster Mills in their own right only and not in the capacity of executors under the beforementioned will) the sum of 100*l.* each in cash.

"2. The said debenture stock shall be part of a total issue of 100,000*l.* debenture stock carrying interest at the rate of 4 per cent. per annum, and be constituted and secured in accordance with the draft of a trust deed already prepared and approved of by the parties hereto.

"3. When this agreement has been filed as below mentioned, the new company shall allot to each of the parties hereto of the first part the shares and debenture stock to which they respectively are to be entitled as aforesaid and thenceforth such respective holders shall hold their respective shares in the old company in trust for the new company.

"4. Before issuing any of the paid-up shares aforesaid the new company shall cause this agreement to be duly filed pursuant to s. 25 of the Companies Act 1867.

"As witness the hands of the said parties hereto of the first part and the common seal of the new company the day and year first above written.

"The schedule hereinbefore referred to.

"Names of parties to whom fully paid-up ordinary shares and fully paid-up preference shares and debenture stock are to be allotted under this agreement and number and amount of such shares and stock respectively:—

Names of Parties.	Number of Ordinary Shares to be allotted.	Number of Preference Shares to be allotted.	Amount of Debenture Stock to be allotted.
			£
Robert William Mills Nesfield .	247	310	18,600
Samuel Burkitt	135	170	10,200
William Wynne Jeudwine . .	135	170	10,200
Robert Fenwick Mills	156	196	11,800
Robert Fenwick Mills and William Forster Mills (executors of M. F. Mills).	80	100	6,000
William Forster Mills	19	25	1,500
William Burkitt	14	19	1,100
Richard Tesdale Dewe	7	10	600
	793	1000	£60,000."

The instrument had been filed with the Registrar of Joint Stock Companies as therein provided, and the shares in the appellant company had been allotted as fully paid to the members of the old company. There had not been any transfer of the shares in the old company by the members of that company to the appellant company.

The commissioners were of opinion that the transaction effected by the instrument was a sale of the equitable interest in the shares of the old company, the consideration being a sum of 700*l.* in cash and the shares and stock of the appellant company to be allotted as fully paid to the members of the old company, and that it was accordingly chargeable with ad valorem conveyance duty by reference to s. 59 of the Stamp Act, 1891, upon the cash paid and the shares and stock allotted. They

1898

CHESTERFIELD BREWERY COMPANY v. INLAND REVENUE COMMISSIONERS.

accordingly assessed the stamp duty of 1200*l.* on the instrument, being the ad valorem duty payable under the head "Conveyance or Transfer on Sale" in the first schedule to the said Act at the rate of 5*s.* for every 50*l.* of the sum of 240,000*l.*, being the aggregate of the sum of 700*l.* paid in cash and of the value of the shares and stock to be allotted as fully paid. The instrument was stamped in accordance with the assessment.

The questions for the opinion of the Court were:—

1. Whether the instrument was chargeable with the duty of 1200*l.* in accordance with the assessment of the commissioners.

2. If not, with what duty the instrument was chargeable.

H. S. Theobald (*Upjohn, Q.C.*, with him), for the appellants. The agreement does not fall under s. 59 of the Stamp Act, 1891 (1), for, first, it is an agreement for the sale to the new company of the whole interest in the shares of the old company, and not for the sale of an "equitable interest" only; and, secondly, the section excludes from the category of "property" (an agreement for the sale of a legal interest in which is to be liable to the duty chargeable under that section) "stock or marketable securities." And by s. 122, "stock" includes "any share . . . . in the capital stock . . . . of any company." Clause 1 of the agreement says that the vendors of the first part shall exchange their shares in the old company for shares in the new, and for certain other considerations. That is an

(1) Sect. 54 of the Stamp Act, 1891: "For the purposes of this Act the expression 'conveyance on sale' includes every instrument, and every decree or order of any court or of any commissioners, whereby any property or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser or any other person on his behalf or by his direction."

Sect. 59, sub-s. 1: "Any contract or agreement made in England or Ireland under seal or under hand only, or made in Scotland with or without any clause of registration, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except (inter alia) stock or marketable securities . . . . shall be charged with the same ad valorem duty, to be paid by the purchaser as if it were an actual conveyance on sale of the estate interest or property contracted or agreed to be sold."

Sect. 122: "The expression 'stock' includes (inter alia) any share . . . . in the capital stock . . . . of any . . . . company . . . . in the United Kingdom."

agreement to transfer their shares in the old company to the new company. It is contended by the Crown that the effect of clause 1 is cut down by the provision of clause 3 that, upon the allotment of the shares and debenture stock of the new company specified in the schedule to the vendors, they shall hold their shares in the old company in trust for the new company. But that is not so. Clause 3 merely states the doctrine of equity which would have applied to the case if that clause had not been there. The clause itself is superfluous. The result would have been the same if it had been omitted. There is nothing in clause 3 to deprive the new company of their right to call for a transfer of the shares in the old. And it is not a proper inference from the agreement that the parties did not intend transfers to be taken. The fact that the old company was unlimited and the new company is limited would be no reason for the latter not taking transfers. For even if they did not take transfers they would be bound to indemnify the vendors, as their trustees, against any loss. The case of *West London Syndicate* v. *Inland Revenue Commissioners* (1), which is in the appellants' favour, is a stronger case than the present. There a vendor agreed to sell the goodwill and lease of an hotel, and, in the event of the landlord refusing consent to the assignment of the lease, to execute a declaration of trust of the leasehold premises in the purchaser's favour. It was held that notwithstanding that by the agreement the purchasers were, in a certain event, to take only an equitable interest, it was not an agreement for the sale of an equitable interest within s. 59.

Secondly, the Crown will contend, in the alternative, that the agreement is a conveyance on sale within s. 54. But the definition of the words "conveyance on sale" given in that section is not wide enough to include this document. In *Commissioners of Inland Revenue* v. *Angus* (2) it was held that the mere fact that an agreement for the sale of property is of such a nature that a Court of Equity would decree specific performance of it is not enough to make it a "conveyance" of an equitable interest in the property. That case was decided

(1) [1898] 2 Q. B. 507. (2) (1889) 23 Q. B. D. 579.

1898

CHESTERFIELD BREWERY COMPANY v. INLAND REVENUE COMMISSIONERS.

under s. 70 of the Stamp Act, 1870; but the terms of that section were substantially the same as those of s. 54 of the Act of 1891. It was because of that decision that s. 59 was introduced into the Act of 1891.

Sir R. Finlay, S.-G., and *Danckwerts*, for the Crown. This agreement is a declaration of trust by which the whole of the shares of the old company are vested in the new company as beneficiary. It was never intended that there should be any legal transfer of the shares to the new company. The case of *West London Syndicate* v. *Inland Revenue Commissioners* (1), and particularly the judgment of Channell J. in the Divisional Court (2), is really in favour of the Crown. Such a declaration of trust as this, being in pursuance of a contract of sale, ought to be stamped as a conveyance on sale under s. 54. But if it is not a conveyance on sale, it is, at all events, an agreement for the sale of an equitable interest in property within s. 59.

Theobald, in reply.

WILLS J. I am of opinion that the contention on behalf of the Crown in this case is right. Clause 3 of the agreement undoubtedly contains a declaration of trust vesting in the new company an equitable interest in the shares of the old company. And I think that the view of Channell J. in *West London Syndicate* v. *Inland Revenue Commissioners* (3) is correct, that "although there is a clause in the schedule of the Stamp Act as to declarations of trust being stamped with a 10*s.* stamp only, yet when those declarations of trust are conveyances in pursuance of sale s. 54 probably applies to them," and they ought consequently to be stamped with an ad valorem stamp as conveyances on sale.

The argument on behalf of the appellants was that the declaration of trust in clause 3 was not the substance of the agreement, but was a mere superfluity, and that the ordinary rule of equity would have produced the same result if the clause had not been there. But even if that be so, I do not think that that fact makes it any the less a declaration of trust whereby

(1) [1898] 2 Q. B. 507. (2) [1898] 1 Q. B. 226.
(3) [1898] 1 Q. B. 226, at p. 240.

an interest in property is vested in the purchaser. But further, I am satisfied that, notwithstanding the language of clause 1 as to the exchange of shares, the real intention of the parties was that this agreement should be the new company's only document of title, and that it should not be followed by a legal transfer of the shares in the old company. For the agreement recites that the old company was being wound up, and upon the completion of that winding-up the shares would be extinguished. Under those circumstances the natural inference is that the parties would wish to avoid the expense of an actual transfer. Further, speaking for myself, I entertain no doubt that this agreement is not only a "conveyance on sale" under s. 54, but that it is also a contract for the sale of an equitable interest in property within s. 59.

BRUCE J. I am of the same opinion. I can entertain no doubt that clause 3 of the agreement operated as a declaration of trust by which the holders of the shares in the old company were constituted trustees of those shares for the new company; and I think that that declaration of trust operated as a "conveyance" of an equitable interest in the shares under s. 54.

Judgment for the Crown.

Solicitors for appellants: *Pilgrim & Phillips.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

J. F. C.

C. A.
1899
May 5.

[IN THE COURT OF APPEAL.]

MAYOR, ALDERMEN, AND CITIZENS OF LIVERPOOL, Appellants *v.* ASSESSMENT COMMITTEE OF LLANFYLLIN UNION and OVERSEERS OF LLANWDDYN, Respondents.

Poor-rate—Waterworks—Rateable Value—Works not directly earning Profit in Parish—Capital Value, Interest on—Cost of Construction.

The corporation of Liverpool were empowered by Act of Parliament to construct a reservoir and other works in a parish in Wales for the purposes of the supply of water to Liverpool. The construction of the reservoir and works involved the submersion of the sites of the parish church, vicarage, and schools, and likewise the stopping up and diversion of certain roads. The Act required the corporation to provide sites for and erect a new church, vicarage, and schools in substitution for those which would be submerged, and to make certain new roads and bridges which were necessary for the purposes of the before-mentioned diversion. The corporation carried out the works in conformity with the Act, provided the requisite new church, vicarage, and schools, and made the necessary new roads and bridges. The corporation, having been rated to a poor-rate in respect of the reservoir and works, appealed to the quarter sessions against the rate. The sessions decided that, in estimating the capital value of the reservoir and works for the purpose of arriving at the rateable value, the amounts expended by the corporation in providing the new church, vicarage, and schools, and making the new roads and bridges, ought to be included as being part of the capital cost of the works :—

Held (reversing the judgment of a Divisional Court), that there was nothing wrong in point of law in the decision of the sessions, which must therefore be affirmed.

Appeal from the judgment of a Divisional Court (Ridley and Phillimore JJ.) upon a case stated by quarter sessions in an appeal by the corporation of Liverpool against a poor-rate made for the parish of Llanwddyn, in the county of Montgomery.

The appellants (1), the corporation of Liverpool, were the owners and occupiers of certain premises and works situate in the parish of Llanwddyn and other parishes in the county of

(1) The terms "appellants" and "respondents" are used throughout with reference to the position of the parties at sessions.

Montgomery, consisting of a reservoir, embankment, and other incidental works, forming part of the waterworks supplying the city of Liverpool. These premises and works were acquired and constructed by the appellants under the provisions of the Liverpool Corporation Waterworks Act, 1880. The said premises and works were suitable and necessary to enable the appellants to discharge their statutory duties under the Act, and, so long as they remained part of the system of water supply to Liverpool, the appellants were practically the only possible tenants of them. The construction of the appellants' reservoir and works involved the submersion of the sites of the existing parish church of Llanwddyn, and also of the vicarage and the National schools. By s. 8 of the Act, provision was made for the stopping up and diversion of certain existing roads for the purposes of the works and the making by the appellants of certain new roads and bridges which were necessary for such diversion. By s. 14 it was provided that, before the appellants should take down or interfere with the parish church, they should build and convey to the Ecclesiastical Commissioners for England a new vicarage on a site and according to plans and specifications previously approved by the said commissioners and the patron of the benefice; and that, in assessing the compensation to be paid by the appellants for the purchase of the existing vicarage and of the site thereof, it should be assumed that the new vicarage and the site thereof should be taken as full compensation for the existing vicarage and the site thereof equal in area to that provided as aforesaid. By s. 15 it was provided that, before the appellants should take down or interfere with the school, they should build in lieu thereof, and convey to the trustees of the school, a new school and teacher's residence on a site and according to plans and specifications previously approved by the Education Department. By s. 32 it was provided in substance that upon completion of the road diversions authorized by the Act the site of the existing roads should vest in the appellants. By s. 34 it was provided that, before the appellants should take down or interfere with the church, they should provide a new site for, and build in lieu thereof, a new church according to plans and

C. A. 1899

LIVERPOOL CORPORATION v. LLANFYLLIN ASSESSMENT COMMITTEE.

specifications previously approved by the Ecclesiastical Commissioners for England and the patron of the benefice, and should provide, in lieu of the burial ground at the old church, a new burial ground as specified in the section.

The structural cost of the dam, reservoir, and other incidental works in the parish in the occupation of the appellants was 646,932*l.*, and the cost of the land upon which the works were constructed was 62,250*l.* The appellants had, in addition to the foregoing amounts, expended on bridges the sum of 8337*l.*, on roads the sum of 55,939*l.*, and on the church, vicarage, and schools in substitution for like buildings which were submerged by the formation of the reservoir the sum of 13,952*l.* None of these hereditaments were in the occupation of the appellants, but they were provided and constructed by the appellants pursuant to the obligations imposed upon them by the Liverpool Corporation Waterworks Act, 1880. The appellants, having been rated in respect of the portion of their reservoir and works situated in the parish of Llanwddyn to a poor-rate made for the parish, appealed against the rate on the ground that the premises were assessed on an excessive valuation. Various questions were raised on the appeal to sessions, but the point with regard to which this case is reported was as follows. At the sessions the estimates of the rateable value of the premises put forward by both the parties respectively were based upon the estimated effective capital value of the dam, reservoir, and works, but they differed, inter alia, as to what ought to be included in calculating that value. The appellants contended that the capital value should be arrived at by adding the structural cost of the works to the cost of the land which formed their site, but that the amount expended by them in roads and bridges under the compulsory provisions contained in their Act should be excluded, whereas the respondents contended that the latter amount should be included as enhancing the value of the reservoir. The quarter sessions were of opinion that, in order to ascertain the effective capital value of the appellants' undertaking in the parish, the amounts expended by the appellants, not only upon roads and bridges, but also on the church, vicarage, and schools, ought to be included as being

in their opinion part of the capital cost of the dam and reservoir, making a total capital cost of 787,410*l.* The sessions confirmed the rate subject to a special case, which raised, among other questions (1), the question whether, in order to ascertain the effective capital value of the appellants' undertaking, the amounts expended by the appellants upon roads, bridges, church, vicarage, and schools or any and which of them ought or ought not to be included. The Divisional Court held that none of the amounts so expended ought to be included, and they ordered the rate to be reduced accordingly.

Marshall, Q.C., and *Ellis J. Griffith*, for the respondents. (2) It was not disputed that in a case like the present the rateable value of the works must be arrived at by taking a certain rate of interest upon their capital value, as being evidence of the amount of rent which a hypothetical tenant of the works must be supposed to be willing to give; and, furthermore, though the amount expended on the works is not a conclusive test of their capital value, still it is primâ facie evidence of it; the more so that the decisions now establish that the corporation must themselves be considered as possible tenants of the works, and therefore the amount which they have been willing to expend is a fair criterion of the value of the works to them. The only question really is whether the amounts expended by the appellants in providing a new church, vicarage, and schools, and in making the new roads and bridges are to be considered as part of the cost of the works. If the appellants had had to pay compensation for the old church, vicarage, and schools in money, it could hardly have been suggested that such a payment would not have been part of the cost of the works. The provision of the new church, vicarage, and schools in lieu of those formerly existing is really payment of compensation for them in kind instead of money. If undertakers of works acquire a site suitable for the

(1) Other questions were raised in the case. The appeal to the Court of Appeal only related to two of the questions raised by the case. The facts and arguments and portion of the judgment which related to one of these questions are not reported, it being merely a complicated question of fact rather than law.

(2) See ante, p. 14, n. (1).

C. A. 1899

LIVERPOOL CORPORATION v. LLANFYLLIN ASSESSMENT COMMITTEE.

works with farm buildings upon it, for which buildings they of course have to pay, it cannot be said that the amount so paid for the buildings is not part of the value of the site to them, because the buildings themselves will be destroyed and be of no use to them. The amounts expended by the appellants on roads and bridges really stand on the same footing in principle as those expended on the new church, vicarage, and schools.

E. Honoratus Lloyd (*Balfour Browne*, *Q.C.*, with him), for the appellants. It is admitted by the appellants that the structural value of the works is, in the case of works like these, to be regarded as a guide in estimating the amount of rent which a hypothetical tenant must be supposed to be willing to give; but it does not follow that everything included in the total amount expended by the appellants forms an element in the structural value of the works. The test of rateable value is the amount of rent which a tenant from year to year would give; and it is common ground that, there being no other means of arriving at that in a case like this but by taking a percentage on the structural value, evidence of the amount expended upon the works themselves is admissible to shew that value. But the amount expended by the appellants in providing a new church, vicarage, and schools elsewhere cannot be said to give any additional value to the works. It was expended, not in the construction of the works, but in pursuance of obligations imposed by the Legislature upon the appellants as a condition of granting them the statutory powers for which they were applying. A tenant would not give any higher rent for the works because, before being allowed to construct them, the appellants had been required by the Legislature to erect the new church, vicarage, and schools. Suppose a builder buys two plots of land for the purpose of erecting houses thereon, and on one plot stands an old mansion-house which he has to pay for, while on the other there are no buildings; an intending tenant will not pay more rent for a house on the former plot than he would for a house on the latter, because the landlord had to pay more for the former plot in consequence of the existence

of the mansion-house. So also, if there were two reservoirs side by side which were in all respects similar, and had been constructed under similar circumstances, except that for the purpose of making one it was necessary to acquire and pull down a church, whereas in the case of the other no such necessity existed, how could it be contended that the rateable value of the one is greater than that of the other on that account? Assuming that the amount expended on the church, vicarage, and schools can be said to be part of the cost of constructing the works; it does not follow that, for the purpose of estimating their rateable value, it ought to be taken into consideration. It does not follow, because a man expends an extravagant sum in building a house, that he can get a rent for it in proportion to the cost of construction. The test in these cases is what is the amount of effective capital value, i.e., the amount spent on productive works. The fact that capital has to be ineffectively spent in building a church, vicarage, and schools elsewhere cannot be considered in estimating what rent a tenant would give for the works.

[A. L. SMITH L.J. The test in such cases is not merely what rent any outside person would give; for, according to the present state of the law, the corporation must be taken into consideration as possible tenants. If so, why should not the total amount which they thought it worth their while to spend on the works be taken into consideration?]

The vicarage is in effect removed to another part of the parish and remains rateable. Why should the parish get its rateable value twice over by getting a rate on the money expended and also a rate on the new vicarage?

Marshall, Q.C., in reply.

A. L. SMITH L.J. In this case a question arises as to the rateable value of that portion of the reservoir and other works constructed by the appellants in pursuance of the Liverpool Corporation Waterworks Act, 1880, which is situated in the parish of Llanwddyn; and, in order to determine that question, it is necessary briefly to refer to some of the provisions of the Act. I may premise what I have to say with regard to them

C. A. 1899

LIVERPOOL CORPORATION v. LLANFYLLIN ASSESSMENT COMMITTEE.

A. L. Smith L.J.

by saying that the works contemplated by the Act involved the erection of a dam across a valley so as to impound the water of a stream flowing through it, and the consequent submersion of a large area of land, including, amongst other things, the parish church, vicarage, and schools. By s. 14 of the Act it is provided that the corporation shall, before interfering with the church, build and convey to the Ecclesiastical Commissioners a new vicarage on a site and according to plans and specifications approved by them, and that the new vicarage and site shall be taken as full compensation for the existing vicarage and site. In other words, instead of paying a money compensation down in respect of the old vicarage, they are to provide a new one. Sects. 15 and 34 of the Act make substantially similar provisions with regard to the schools and church respectively. By ss. 8 and 32 provision is made for the diversion of certain roads, and the construction of the new roads and bridges which will in consequence become necessary, and the vesting of the sites of the old roads in the corporation. The corporation constructed the reservoir and works as contemplated by the Act, and duly made the new roads and bridges, and provided the new church, vicarage, and schools as required thereby. The question now arises as to the rateable value of the reservoir and works so constructed.

It is familiar law that, where a hereditament can be compared with other hereditaments of a like nature which are the subject of letting, its rateable value may be arrived at by shewing what rent tenants from year to year will in fact give for such hereditaments; but a difficulty in rating law arises with regard to hereditaments which cannot be compared with other similar hereditaments so as to ascertain the rent which a tenant will actually give for them. Therefore, inasmuch as a rateable hereditament cannot be allowed to escape from being rated because no such comparison can be made, in such cases it has come to be a recognised position that the rent which a hypothetical tenant would give for the hereditament must be estimated in some other way. In a case like the present, where no profits are earned in the parish by the use of the hereditament, a rough way of arriving at the rateable value by rule of

thumb, there being no other way available, is to see what the site and the construction of the works cost, and take a percentage on the capital amount so expended as representing the rent which a tenant would give. The problem with regard to the mode of estimating the rateable value in a case of this kind has been simplified by the introduction some years ago in the case of *Reg.* v. *School Board for London* (1) of the principle that the occupying owner of the hereditament may be considered as a possible tenant. If a person buys a piece of land, and spends so much in erecting a building upon it, the amount so expended by him forms some criterion of the rent which he would give, if he had to rent the hereditament so created. I agree that a certain rate of interest on the capital expended in creating the hereditament is by no means to be taken as necessarily equivalent to the rent which a hypothetical tenant would give; but I think the amount of capital expended is admissible in evidence as a criterion by which to estimate that rent in the case of works like these which are incapable of being compared with other hereditaments which form the subject of letting. Both parties to the appeal agree that the capital value of the works is the subject-matter to be considered in order to arrive at their rateable value, the point on which they differ being as to what is to be included in estimating the capital value. The appellants say that it is to be ascertained by taking the amount paid by them for the purchase of the land and that expended in the construction of the reservoir and works, but excluding the amounts expended by them in providing the new church, vicarage, and schools, and making the new roads and bridges. The respondents, on the other hand, say that the last-mentioned amounts ought to be included. The Divisional Court has affirmed the contention that they should be excluded. I cannot agree with their decision. The sessions, who had to determine the value, as a matter of fact held that the amounts so expended should be taken into account, and I cannot see that there is anything wrong in law in that decision. I have already pointed out that the corporation must be taken into consideration as possible tenants of the works.

(1) (1886) 17 Q. B. D. 738.

C. A. 1899

LIVERPOOL CORPORATION v. LLANFYLLIN ASSESSMENT COMMITTEE.

A. L. Smith L.J.

They could not construct the works which they desired to construct as necessary for the purposes of the water supply to their city without coming under the obligation to provide a new church, vicarage, and schools in lieu of paying a pecuniary compensation for those which would be destroyed by the works. I cannot see why as a matter of law that expenditure was not properly taken into account by the sessions in arriving at the rateable value. As I have before said, I agree with the contention for the appellants that the amount actually expended on the works is not necessarily the conclusive test by which to ascertain the rateable value in such cases, but it is evidence which affords some criterion of the value. The sessions in the present case came to the conclusion that the expenditure in question ought to be taken into account as an element in determining what in fact was the capital value of the works; and I cannot see that being by Act of Parliament forced to erect a church, vicarage, and schools elsewhere in the place of those submerged, and pay for so doing, is not a capital expenditure, as if the same expense was incurred by payment down for the matters mentioned. The same considerations appear to me to apply to the amount expended in providing roads and bridges as to that expended on the new church, vicarage, and schools. For these reasons I think the appeal must be allowed.

VAUGHAN WILLIAMS L.J. I am of the same opinion. This is a case that raises a question with regard to the application of what has been sometimes called the contractor's theory of rent, which is applicable where there is no possibility of arriving at the rateable value of the property in question by reference to actual lettings of the same or similar property. It is common ground between the parties that the proper assessment in this case must be arrived at by taking the structural value of the works as a basis, and, having ascertained that value, finding what rent the hypothetical tenant from year to year would pay for premises of that value. It is practically also common ground that that rent can only be arrived at by taking interest at some rate or other upon the structural value so ascertained. That being so, how is the structural value to be arrived at?

Nobody says that it is necessarily to be arrived at by simply totalling the items of the structural cost. The total of the items of structural cost might very much misrepresent the structural value, and might in many cases be apt to lead to an overestimation of it. One can conceive cases in which the expenditure on works may be shewn to have been injudicious, in which a short experience may have proved it to have been fruitless, or in which it may have been made upon machinery or buildings which have become obsolete. In such cases it might be wrong to take the total of structural cost as representing the structural value. But, though no one says that it is right to take structural cost as a conclusive test, it is clear that it may and ought to be taken into consideration as a factor in determining the structural value. Such, as I understand it, is the principle established by the case of *Reg.* v. *West Middlesex Waterworks*. (1) There in dealing with land and machinery which did not yield any direct profit in the parish, but indirectly conduced to profits elsewhere, the Court held that they must be rated according to their value in the parish in which they were situate, and, there being no other means of arriving at the rent which a hypothetical tenant would give for them, they said that it would be proper to arrive at that rent in the way which I have endeavoured to explain. Wightman J. in delivering the considered judgment of the Court says: "But, as these parts of the apparatus, directly earning nothing, but indirectly conducing to such earnings elsewhere, are assumed to continue in operation, the company, to whose interest such continued operation is essential, must be assumed to pay adequate remuneration to a contractor for land and fixed capital vested therein, together with the labour and skill requisite for the effective continuance of such operation; and this contractor with the company would stand in the relation of occupying tenant to the parish, and the part within the parish would be the rateable subject, and the local rateable value would be such sum as would pay the rent of the land and the profit on the fixed capital therein." It does not follow from this that the whole of the amount expended is to be taken into consideration

(1) (1859) 1 E. & E. 716; 28 L. J. (M.C.) 135.

C. A. 1899

LIVERPOOL CORPORATION v. LLANFYLLIN ASSESSMENT COMMITTEE.

Vaughan Williams L.J.

in arriving at the capital value. Such being the principle laid down, I proceed to deal with the question raised in this case, which is whether, in order to ascertain the effective capital value of the appellants' undertaking, the amounts expended by them upon roads, bridges, church, vicarage, and schools ought to be included or not. The Divisional Court were of opinion that they ought not. I confess I cannot understand their conclusion. It is really a conclusion that, as a matter of law, all that expenditure ought to be excluded in arriving at the rent which a hypothetical tenant would give. How that proposition can be maintained, unless we are prepared to go the length of saying that structural cost can never be considered in arriving at structural value, I cannot understand. It seems to me that the money expended by the appellants in providing the new church, vicarage, and schools is as much part of the cost of the rateable hereditament as if that money had been paid in cash as part of the purchase price of the land. The fact that, instead of making a payment in cash, the corporation agreed to spend this money in the erection of a church, vicarage, and schools in substitution for those submerged does not seem to me to make any material difference. The same considerations appear to me to apply to the money expended by the corporation on roads and bridges, though in regard to them there is no provision in the Act stating that the making of them is to be taken as compensation for those which are destroyed. It is equally plain with regard to them that, where one is estimating the rent which the occupying owners would be willing to pay as tenants by taking interest at a certain rate on the capital expenditure on the works, it is impossible to exclude from that expenditure the burden which the corporation accepted when they obtained their Act of providing these new roads and bridges.

ROMER L.J. I agree. It is really admitted that this is a case in which, in order to estimate the rent which a hypothetical tenant would pay for the works in question, regard ought to be had to the amount of capital expended in the construction of them. This is a good rough principle on

which to act in cases like the present, because it may be assumed primâ facie that a body like the appellants erecting works like these will not spend more than the works will be worth to them. It does not follow that expenditure incurred on the works, which could be shewn to be obviously unnecessary or wasteful, ought to be regarded. In estimating the expenditure on works like this reservoir, it is obvious that the cost of acquiring buildings which stand upon the site which it is necessary to acquire for the works must be included. Applying that to the church, vicarage, and schools in the present case; their sites being required for the reservoir, it was necessary to acquire them, and the expenditure of the amount of money requisite for their acquisition could not be regarded as unnecessary or wasteful. If they had been paid for in cash, I do not think any question could possibly have arisen. But in this case, though the corporation did not pay in cash, they paid in kind. By the special Act, instead of paying money, they were required to erect similar buildings on other sites. I do not think that makes any difference in point of principle. The expense of erecting the new buildings elsewhere was as much part of the capital expenditure on the works as if it had been cash paid to the owners of the old buildings for the purchase of them. Similar observations apply to the expenditure on new roads and bridges, there being no suggestion that the making of these was unnecessary or wasteful.

Appeal allowed.

Solicitors for appellants: *F. Venn & Co., for Clare, Town Clerk, Liverpool.*

Solicitors for respondents: *Robbins, Billing & Co., for Pughe & Jones, Llanfyllin.*

E. L.

1899
April 28;
May 1.

THE QUEEN *v.* COUNTY COUNCIL OF GLAMORGAN. *Ex parte* MILLER AND OTHERS.

Local Government—County Council—Troops summoned to preserve the Peace—Expenses of Maintenance—Liability—Mandamus.

Troops were brought into a county, on the application of the county magistrates, for the purpose of suppressing riots, and preserving peace and order in the county. By agreement with the magistrates certain tradesmen supplied the troops with food and lodging while quartered in the county.

On an application for a mandamus to the county council to pay for the food and lodging supplied:—

Held, that no duty was imposed by law on those who administered the county funds to pay the expenses of the maintenance of the troops, and a mandamus could not be granted.

AN order had been granted, calling on the county council of Glamorgan to shew cause why a writ of mandamus should not issue commanding the county council to pay to the prosecutors, out of the county fund, certain sums of money, amounting altogether to 2703*l.* 17*s.* 4*d.*, for the expenses of housing and maintaining soldiers, who had been brought into the county from Devonport, in pursuance of a resolution of the county magistrates, for the purpose of suppressing riots and disturbances connected with a strike of miners in South Wales, and of preserving peace and order in the county. Serious riots took place on May 26, 27, and 28, 1898, and on May 29 the magistrates held a meeting, and, after consultation with the police authorities, resolved to call in the assistance of the military. Arrangements were made on behalf of the magistrates for the maintenance of the troops called in, and in pursuance of these arrangements the prosecutors supplied food and lodging to the soldiers for a considerable time. The accounts were certified by the magistrates, and were sent in to the county council, but, a dispute having arisen as to payment, the county council refused to pay, whereupon an order nisi for a mandamus was moved for and obtained.

1899

REG. v. GLAMORGAN COUNTY COUNCIL. MILLER, *Ex parte.*

H. L. Stephen (*Asquith, Q.C.*, with him) shewed cause. There is no authority for the proposition that expenses such as those in question in the present case can be charged upon the county fund, so as to make the county council liable. On the contrary, the law is, as stated in 2 Clode's Military Forces of the Crown, p. 142, "that the military are sent to, and remain in, a particular town (where their services are needed by the inhabitants, as armed police, for the protection of property, or the preservation of peace) not at the expense of the local, but of the general community." The learned author expresses his disapproval of this state of the law, and suggests that it should be altered by legislation, which, as he points out, has been done in several instances with regard to matters connected with the police. For instance, in the case of special constables, the payment of expenses is specially provided for by statute (1 & 2 Will. 4, c. 41, 5 & 6 Will. 4, c. 43), but there is no analogous legislation relating to the military forces. There can be no common law liability, for by the Petition of Right, 1627 (3 Car. 1, c. 1), and the Bill of Rights, 1688 (1 Will. & Mary, sess. 2, c. 2), it is illegal to raise or keep a standing army in time of peace, unless with consent of Parliament, and therefore the military forces are regulated by the annual Army Acts, which now re-enact the Army Act, 1881, (44 & 45 Vict. c. 58). By 2 Hen. 5, stat. 1, c. 8, which has not been repealed, provision is made for the suppression of riots by the justices, and sheriff or under-sheriff, with the power of the county, and the justices and other officers are to exercise their offices at the King's costs. Similarly, where the military forces of the Crown are employed in the same service, the expenses are an imperial, not a local, charge. If there is any liability, it can only be for the amount sanctioned by the standing joint committee of the county council and quarter sessions: Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 66. (1)

C. A. Russell, Q.C., and *S. G. Lushington*, in support of the order. The argument on behalf of the county council appears to suggest that there is a difference between the position of soldiers and that of private citizens with regard to the duty to

(1) As no decision was given on this point, the argument is omitted.

1899

REG. v. GLAMORGAN COUNTY COUNCIL. MILLER, *Ex parte.*

act in the suppression of riots. But soldiers are only summoned to suppress riots in the same way as all citizens are liable to be summoned for that purpose, and the law acknowledges no distinction between a soldier and a private individual, but both lie under the same obligations. This is clearly pointed out by Tindal C.J. in his charge to the grand jury in the case of the *Bristol Riots*. (1) The Act of 2 Hen. 5, stat. 1, c. 8, which has been referred to, cannot affect the question of liability in the present case, for in those days there was no standing army. Bringing troops into a particular district, for the purpose of suppressing riots, is a defensive act, done for the benefit of the inhabitants of that district, and it is fair that the ratepayers, who have the benefit of the protection, should pay the expenses. The practice as to providing accommodation for the troops in such cases is shewn by the Queen's Regulations and Orders for the Army, 1898. No. 275 (under the head of 'Duties in aid of the Civil Power') is as follows: "The chief constable of a county or riding, or the watch committee in the case of a borough or city, &c., is the civil authority, to whom the officer commanding the troops will look to make arrangements for accommodation, food, and other immediate requirements," &c. If the county fund is not to defray the expenses, the question will arise, who is to be liable. It can hardly be suggested that the magistrates, who made the arrangements, should be liable.

[The following authorities were also referred to: *Rex* v. *Essex, Inhabitants* (2); *Rex* v. *Tower Hamlets, Commissioners of Sewers* (3); *Attorney-General* v. *Norwich Corporation* (4); *Attorney-General* v. *Pearson* (5); *Stops* v. *Northamptonshire Justices* (6); *Report of Committee appointed to inquire into Circumstances of Featherstone Riots*. (7)]

DARLING J. In this case an order nisi has been obtained for a mandamus, commanding the county council of Glamorgan to pay, either a particular sum for the maintenance of troops

(1) 3 State Trials, N.S. 1, at col. 5.
(2) (1792) 4 T. R. 591.
(3) (1830) 1 B. & Ad. 232.
(4) (1837) 2 My. & Cr. 406.
(5) (1846) 2 Coll. 581.
(6) (1887) 4 Times Rep. 78.
(7) Home Office Papers, 1893, C. 7234.

brought into their district for the purpose of quelling riots, or, if the county council is not liable for a definite sum, then to pay a reasonable amount. I think that, if we could grant a mandamus in this case, it would have to be for payment of a reasonable amount; but, for the reasons which I will state, we have come to the conclusion that a mandamus cannot be granted, and the order nisi must be discharged. Wills J. heard the whole of the argument on the point on which the decision turns (1), and we are all of opinion that the case is one in which a mandamus cannot be granted. It is said, in the first instance, that magistrates have the right to ask for the assistance of troops under circumstances such as those which existed in the present case. No doubt they have this right, and they can ask the authorities at the War Office for the assistance of troops, in order to put down riots, whether existing or apprehended. In support of the proposition that troops may lawfully be called on to assist in putting down riots, I may refer to two authorities. The first of these is a Report by the Attorney-General, Sir Robert Raymond (2), contained in a letter, dated January 10, 1721, and addressed to Lord Carteret, one of the Principal Secretaries of State, with reference to certain riots at Taunton. The following passage is material: "I humbly certify to your Lordship that by the law any person may justify the assistance of the civil magistrate or officer in keeping the peace, or executing legal process, when required by such officer or magistrate, without distinction whether such a person is a civil or military man, and therefore I am of opinion orders may be legally given to the gentlemen of the army at Taunton, that whenever a great riot is committing, or any warrant of any justice of peace, or other legal process, is attempted to be executed on any criminals or offenders, in order to bring them to justice, and a rescue is endeavoured to be made of such criminal, or resistance made to the execution of such warrant or process, or to the civil magistrate or officer executing such process, or endeavouring to bring such offender to justice, that the soldiers in such cases

(1) Wills J. heard the argument on April 28, but was unable, owing to illness, to be present on May 1. (2) Afterwards Lord Raymond C.J.

1899

REG. v. GLAMORGAN COUNTY COUNCIL. MILLER, *Ex parte.*

Darling J.

should give their assistance to such civil magistrate or officer, with a caution that they should not at all interpose in any of these things, but at such times as they shall be desired by the civil magistrate or officer, who best will judge when they stand in need of their assistance." (1) I will next refer to the report of the law officers, Sir John Scott (2) and Sir John Mitford (3), dated July 30, 1796, addressed to the Duke of Portland. That report contains the following statement: "So far as is consistent with obedience to military discipline and command, we apprehend the civil magistrates have the same power to call for the assistance of the military as they have to call for the assistance of others of His Majesty's subjects. But we apprehend the magistrates have no power to call for the assistance of the military in cases in which they cannot call for the assistance of other of His Majesty's subjects. We think that where a magistrate has reason to apprehend that the ordinary civil power will not be sufficient for the preservation of the public peace, he may command all persons present to assist him in the preservation of the public peace, although no breach of the public peace shall have been actually committed; and, if he shall know, or shall have been informed, that any riot, rout, or other assembly against the peace, has actually taken place, he may call all persons within his jurisdiction to attend him to the spot, and assist him in suppressing such riot, rout, or other assembly, and apprehending the offenders, and all persons so called upon are bound to give their assistance, so far as is consistent with other duties of equal or superior obligation. But we apprehend the magistrates cannot require from the military any assistance repugnant to the obligations of their military duty." (4) And in a further report, dated December 19, 1796, the same law officers state their opinion thus: "We conceive that the military duty of a soldier remains whilst he acts under the orders of a civil magistrate; that he is still necessarily subservient to military discipline; and that the command of the

(1) Clode's Military Forces of the Crown, vol. ii. p. 621.

(2) Afterwards Lord Eldon L.C.

(3) Afterwards Lord Redesdale, Lord Chancellor of Ireland.

(4) Clode's Military Forces of the Crown, vol. ii. p. 638.

magistrate cannot exempt him from that discipline." (1) It is plain from these statements that the magistrates have the same right to ask for the assistance of soldiers for the purpose of quelling riots as they have to ask for the assistance of any one else; but in order to obtain this assistance the magistrates require the aid of the military authorities. The magistrates can call upon the soldiers, as citizens, to give their assistance; but while doing so the soldiers must obey their military officers, and if they do not obey they will be liable to punishment. It is said that, because the magistrates have power to call on the soldiers, as citizens, to keep the peace, therefore the county funds are liable for the maintenance of the soldiers while so engaged. There is an utter absence of authority for that proposition. There was no authority cited to shew that the magistrates are bound to maintain the troops, nor is it shewn that persons other than soldiers have ever been in any way reimbursed by the magistrates under such circumstances (unless in the case of special constables, which is specially provided for (2)). On the other hand, there is something on which an argument by analogy in favour of the opposite view may be founded. The Act of 2 Hen. 5, stat. 1, c. 8, after providing for the suppression of riots by the justices, and the sheriff or under-sheriff of the county, "with the power of the said county," contains this clause: "Provided always, that the said justices, and other officers aforesaid, shall exercise their offices aforesaid at the King's costs in going and continuing in doing their said offices, by payment thereof to be made by the sheriff of the same county for the time being, by indentures betwixt the sheriff and the said justices and other officers aforesaid, to be made of the payment aforesaid, whereof the said sheriff upon his account in the Exchequer may have due allowance." It is true that at that time there was no standing army; but the same services would be rendered as were rendered by the troops in the present case, and the Crown would bear the cost, not the county. It is not contended that the county should bear the expenses of the carriage of the troops, and it does not seem so absolutely

(1) Clode's Military Forces of the Crown, vol. ii. p. 645.

(2) 1 & 2 Will. 4, c. 41; 5 & 6 Will. 4, c. 43.

1899

REG. v. GLAMORGAN COUNTY COUNCIL. MILLER, *Ex parte.*

Darling J.

unjust, as has been suggested, that the Crown should bear the expenses of their maintenance. There is no authority the other way, and the argument of inconvenience does not seem to be entitled to serious consideration. The passage, already cited, from 2 Hen. 5, stat. 1, c. 8, is rather in favour of the view which we take. Both on authority such as there seems to be, and on considerations of convenience—for the magistrates will not the less readily ask for troops to preserve the peace, if the county is not to be at the charge of them—I have come to the conclusion that there is no power to charge the expenses here in question on the county funds, and therefore that the order nisi for a mandamus ought to be discharged.

CHANNELL J. I am of the same opinion. This is an application for a mandamus, and, in order to obtain a mandamus, it is necessary to shew the existence of a duty, which has to be performed, and of which the Court can enforce the performance. The question to be decided is this: Is it made out that those who administer the county funds have a duty imposed upon them to pay the expenses of the maintenance of troops brought into the district for the purpose of suppressing riots? That is the whole point. Is there any general duty to pay any head of expenses under which this claim can be brought? It was, I think, made out by Mr. Stephen that there is no power to charge the ratepayers with the expenses of soldiers as such. The authorities shew that the soldiers, when called in to suppress a riot, would act as citizens. It comes, therefore, to this: Is there any general duty imposed on the county ratepayers to pay the expenses of keeping the peace? No authority whatever has been quoted to us establishing any such general proposition. The expenses of the police are provided for in the Local Government Act, 1888 (1), by a very special provision, and the expenses of special constables are also provided for by statute. (2) Certain special expenses of keeping the peace are thus thrown by special regulation on the county funds, but that does not shew that any general duty to pay all such

(1) 51 & 52 Vict. c. 41, s. 24.
(2) 1 & 2 Will. 4, c. 41; 5 & 6 Will. 4, c. 43.

expenses is imposed on the county council, nor is there any reason why the expenses here in question should be thrown on the county in particular. The liability for damage by riot was, for some reason, formerly imposed on the hundred. It is now imposed on the police district. (1) I can see no reason why the expenses here in question should be imposed on the county, rather than on any other area, or on the country at large, for it is for the interest of all the country that riots should be put down. It is also said that the justices are local justices, and therefore the expenses incurred by them should be local expenses; but the justices are officers of the Crown, although they have a local jurisdiction. In the result I cannot see that there is any general duty imposed on the county council to pay these expenses. It is not necessary to decide the other question; but, if there were any liability, it would probably be only for reasonable expenses.

Order nisi for mandamus discharged.

Solicitors for prosecution: *Bell, Brodrick & Gray, for Linton & C. and W. Kenshole, Aberdare.*

Solicitors for county council: *Cheston & Sons.*

(1) 49 & 50 Vict. c. 38.

P. B. H.

1899
May 9.

WHITE, Appellant; MORLEY, Respondent.

Local Government — By-law — Betting in Streets — Statutory Enactment— Repugnancy—Metropolitan Streets Act, 1867 (30 & 31 *Vict. c.* 134), *s.* 23.

A by-law made by the London County Council provided that no person should frequent and use any street or other public place for the purpose of betting, under a penalty. By s. 23 of the Metropolitan Streets Act, 1867, any three or more persons assembled together in any part of a street for the purpose of betting shall be deemed to be obstructing the street, and each of them shall be liable to a penalty:—

Held, that the by-law was not repugnant to s. 23, and was valid.

Case stated by a metropolitan police magistrate.

Upon the hearing of two summonses against the appellant, charging him with, on December 2 and 3, 1898, unlawfully frequenting and using Palmer Place, Holloway Road, for the purpose of betting, contrary to the by-laws of the London County Council (1), the following facts were proved or admitted.

On December 2, 1898, the appellant was standing, at about 1.45 p.m., on the footway of Palmer Place, which is a street and a public place. He stood there for about ten minutes, and during that time was approached successively by four persons, who handed to him slips of paper and money, and then walked away. They approached him singly, and there was never more than one person with him at any one time.

On December 3, 1898, at or about the same time, the appellant was standing in the same place for about ten minutes, and during that time was approached successively by three persons in the manner above described, who handed to him money and slips of paper.

(1) By-laws made by the London County Council on July 19, 1898, in pursuance of the provisions of s. 23 of the Municipal Corporations Act, 1882, and s. 16 of the Local Government Act, 1888; and which came into force on October 1, 1898. "4.—No person shall frequent and use any street or other public place on behalf, either of himself or of any other person, for the purpose of bookmaking or betting, or wagering, or agreeing to bet or wager with any person, or paying, or receiving, or settling bets."

The magistrate held that the by-law was valid, and convicted the appellant.

The question for the opinion of the Court was whether the by-law was a valid by-law in the metropolis.

Joseph Walton, Q.C. (*Horace Avory* with him), for the appellant. First, this by-law is bad. It is not a reasonable exercise of the power, given by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23, and the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 16, to make by-laws for the good rule and government of a borough or county. It amounts to an absolute prohibition of betting in the streets, and is too wide. By-laws to be valid must contain reasonable limitations: *Johnson* v. *Mayor, &c., of Croydon* (1); *Strickland* v. *Hayes*. (2) Although it must be admitted that a by-law in nearly the same terms was held good in *Burnett* v. *Berry* (3), in the subsequent case of *Kruse* v. *Johnson* (4) the expressions used by Sir Francis Jeune in his judgment (5) shew that he thought a by-law containing a general unlimited prohibition would not be valid.

Secondly, the by-law cannot be supported on the ground that betting in the streets is likely to cause obstruction and annoyance to the public. That matter has been already dealt with by the Metropolitan Streets Act, 1867, s. 23 (6), which provides that if three persons assemble in the streets for the purpose of betting that shall be deemed to be an obstruction. The by-law makes it an offence for any one person to use the street for betting, and it is repugnant to the provisions of the statute, and therefore bad. A by-law cannot alter, as this has done, the condition without which there is no offence under the general law; nor can it vary

(1) (1886) 16 Q. B. D. 708.
(2) [1896] 1 Q. B. 290.
(3) [1896] 1 Q. B. 641.
(4) [1898] 2 Q. B. 91.
(5) [1898] 2 Q. B. at pp. 105, 106.
(6) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 23: "Any three or more persons assembled together in any part of a street within the metropolis for the purpose of betting shall be deemed to be obstructing the street, and each of such persons shall be liable to a penalty not exceeding five pounds."

1899

WHITE v. MORLEY.

the offence by substituting another condition: *Bentham* v. *Hoyle*. (1)

Dickens, *Q.C.* (*Daldy* with him), for the respondent. *Burnett* v. *Berry* (2) is conclusive, in the respondent's favour, on the question whether, apart from the Metropolitan Streets Act, 1867, the by-law is one which could properly be made for the good rule and government of London.

Next, a by-law is not necessarily inconsistent with or repugnant to a statutory enactment merely because it forbids something which the Act does not forbid. It must be repugnant in the sense that it forbids something which the Act allows: *Edmonds* v. *Master, &c., of the Company of Watermen and Lightermen*, judgment of Lord Campbell C.J. (3) The by-law and the statute deal with different states of things. The statute provides for a state of things likely to cause obstruction, and makes proof of actual obstruction unnecessary by providing that an obstruction shall be deemed to be caused if three people meet in the street for the purpose of betting, whilst the by-law prohibits the frequenting of the street by any one person for the purpose of betting. So far as the by-law is directed against obstruction it is directed against a different kind of obstruction to that with which the statute deals—namely, the obstruction likely to be caused by one person habitually going to the same place in order to bet, and thereby causing others to go in the expectation of finding him there. There are other reasons, unconnected with obstruction, which justify a by-law prohibiting a bookmaker from using a street or other public place for the purpose of carrying on his business.

[*Jones* v. *Walters* (4) was also referred to.]

Joseph Walton, *Q.C.*, replied.

DARLING J. I think that this appeal must be dismissed. The first question is whether, apart from the provisions of the Metropolitan Streets Act, this would be a good by-law. I think that it certainly would be so, as being a reasonable regulation

(1) (1878) 3 Q. B. D. 289.
(2) [1896] 1 Q. B. 641.
(3) (1855) 24 L. J. (M.C.) 124, at p. 128.
(4) (1898) 62 J. P. 374.

for the good rule and government of the county of London. I think that the object of the by-law is to prevent the use of the streets for a purpose for which they are not intended to be used. The streets are intended for people to pass along. This by-law is directed against persons who frequent and use the streets or other public places in London for the purpose of bookmaking or betting. I should say that it was obvious that, if the streets were to be used for that purpose, it would tend to prevent their natural use, which is for persons walking about London to pass along them. Further, I am inclined to think that, since the judgment of the Lord Chief Justice in *Burnett* v. *Berry* (1), a local authority may say that their streets shall not be used for the purposes of betting, apart from any question of obstruction, in the same way as the Legislature has said that houses shall not be kept for that purpose. I also think that in *Kruse* v. *Johnson* (2) it is laid down as a principle that the Courts should not look at the by-laws of local authorities—the popularly elected governing bodies of boroughs and counties—from the same point of view as that from which they were in the habit of looking at the by-laws of railway companies and other like bodies, and that a larger discretion is to be given to those public representative bodies than is given to private bodies.

But it is said that this by-law is invalid on the ground that it is repugnant to s. 23 of the Metropolitan Streets Act, 1867. If the statutory enactment and the by-law were both aiming at the same thing, and the former was coupled with a condition which the latter was without, I should then be of opinion that they were repugnant. The law on this point can be gathered from the expressions of Cockburn C.J. in *Bentham* v. *Hoyle*. (3) He said (4): "The 103rd section includes this very case, and makes the offence subject to the condition of an intention on the part of the party travelling to avoid payment of the fare . . . . I think that is an indication on the part of the Legislature of what they intended should constitute the offence, and it is not competent for a railway company to alter

(1) [1896] 1 Q. B. 641.
(2) [1898] 2 Q. B. 91.
(3) 3 Q. B. D. 289.
(4) 3 Q. B. D. at pp. 293, 294.

1899

WHITE v. MORLEY.

Darling J.

the nature and character of the offence, and to say that this is a reasonable exercise of the power to make by-laws entrusted to them by the Act. Therefore, if those qualifying words do not govern the whole of the by-law in question, then the by-law is inconsistent with the Act of Parliament, and therefore unreasonable and ultra vires. The Legislature cannot have intended, while it was legislating with reference to the very case under consideration, to give the company, when it gave that power to make by-laws, a power to supersede the Act and make that an offence which the Legislature did not." The question, therefore, is whether this statutory enactment and this by-law do deal with the same case. I do not think that they do. It is true that they both deal with betting, and that they both deal with obstruction of the streets. But that which is punishable under the one is not punishable under the other. The statute prohibits three persons meeting together and making bets in the streets. It does not say that one person may not use the streets for betting purposes; neither does it say that he may do so. The by-law, on the other hand, says that one person shall not frequent and use the streets for betting. That is quite a different thing from what the statute provides against. The statute prohibits three persons assembling together—that is, on any one occasion—in a street for the purpose of betting; the by-law prohibits any one person frequenting and using a street or other public place for betting, whether other persons come to him there or not, provided that he frequents it. It seems to me, therefore, that the by-law and the statute deal with two different offences, and that the objection that the by-law is repugnant to the statute fails.

CHANNELL J. I am of the same opinion. Apart from the Metropolitan Streets Act, the case of *Burnett* v. *Berry* (1) would be directly in point in this case, and is binding on us; so that, even if we did not agree with it, we should have to follow it. By saying that, I do not mean to throw any doubt upon the decision in that case: I do agree with it. It seems to have been already followed in *Jones* v. *Walters*. (2)

(1) [1896] 1 Q. B. 641.

(2) 62 J. P. 374.

The question, apart from that which arises on the Metropolitan Streets Act, is whether this by-law is within the powers conferred by statute on the county council, and whether it is reasonable. *Burnett* v. *Berry* (1) concludes that question. Since that case was decided, the case of *Kruse* v. *Johnson* (2) has been heard, and has thrown a good deal of light on the previous decisions as to the reasonableness of by-laws. I think that the principle of that decision is that, where a thing is of such a character as that it can be a nuisance, it is to rest with the local authority to say whether it shall be considered to be a nuisance in the particular locality for which they have power to make by-laws. The Court can say whether it is reasonably possible for the prohibited act or thing to be a nuisance; but they cannot say whether it should or should not be forbidden in the particular locality. That case is, therefore, an additional authority for holding that this by-law is not unreasonable.

There remains the question as to the Metropolitan Streets Act. By-laws must not only be reasonable, but must not be repugnant to the general law. A by-law is a local law, and may be supplementary to the general law; it is not bad because it deals with something that is not dealt with by the general law. But it must not alter the general law by making that lawful which the general law makes unlawful; or that unlawful which the general law makes lawful. Applying that principle here, my brother has pointed out the distinction between the statutory enactment and the by-law in this case. Assuming that this is a by-law for the good government of London only with reference to the prevention of an obstruction of the highway, I think that the two provisions are distinct. The Metropolitan Streets Act makes the assembling together of three persons for something that is beyond the ordinary user of the highway an obstruction of the highway and punishable with a fine. Then the by-law makes a different thing an offence. It makes the frequenting the place unlawful. A man would not frequent a place to make bets, if no one ever met him there. Other people would assemble, and the result

(1) [1896] 1 Q. B. 641. (2) [1898] 2 Q. B. 91.

1899

WHITE v. MORLEY.

Channell J.

would be an obstruction, caused by a different misuse of the streets. The gist of the offence under the Metropolitan Streets Act is the three people getting together. The gist of the offence under the by-law is the frequenting—the doing it often—by one person. I think that they are two different offences; and that, assuming that the by-law can only be supported as being against the misuse of the streets considered as highways, it is not repugnant to the statute. But I am inclined to think, as my brother has said, that the expressions of the Lord Chief Justice in *Burnett* v. *Berry* (1) meant to treat the by-law there as going beyond the mere misuse of the highway, and to say that it was within the power of a local authority to apply to their streets a prohibition of that which was already forbidden by the general law in houses and other places. Wright J. seems to have said the same thing in *Jones* v. *Walters*. (2) If that be right, it is obvious that there is no inconsistency between the by-law and the statute.

Appeal dismissed.

Solicitors for appellant: *Lewis & Lewis.*
Solicitor for respondent: *W. J. Blaxland.*

(1) [1896] 1 Q. B. 641.

(2) 62 J. P. 374.

W. A.

KINSON POTTERY COMPANY, LIMITED, APPELLANTS *v.* CORPORATION OF POOLE, RESPONDENTS. 1899 *May* 17.

Local Government—Sewers—Nuisance by Sewage—Drainage of Houses—Want of Structural Convenience—Liability of Owners—"Drain"—"Sewer"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13, 15, 21, 94, 95.

The appellants were summoned by the sanitary authority of a borough for non-compliance with a notice to abate a nuisance caused by turning slop and scullery water from twelve houses, owned by the appellants, into a drain constructed beside a highway to receive the surface water of the highway, which emptied into an open ditch. According to the plan, deposited with the sanitary authority when the houses were built by the appellants' predecessor in title, the houses should have been drained into cesspools, but cesspools to receive the slop and scullery water had not been constructed. No sewer had been constructed by the sanitary authority, by means of which the houses could be drained. The houses were separately occupied, and were not within the same curtilage. The justices made an order to abate the nuisance, by disconnecting the drains of the houses from the surface-water drain, and making cesspools for the houses.

On a case stated:—

Held, that the sanitary authority were not bound, under the Public Health Act, 1875, s. 15, to provide a sewer to drain the appellants' houses, that the surface-water drain, though for some purposes a "sewer," within the meaning of s. 4, was not a sewer into which the appellants were entitled to empty their drains, that the nuisance was caused by the want of a structural convenience, within the meaning of s. 94, and therefore the defendants, as owners, were liable.

CASE stated by justices for the borough of Poole.

A complaint was preferred by the respondents, as urban sanitary authority of the borough of Poole, against the appellants, under s. 95 of the Public Health Act, 1875 (1), whereby

(1) By 38 & 39 Vict. c. 55, s. 94, "On the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance, the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose; provided—

"First, that where the nuisance arises from the want or defective con-

1899

KINSON POTTERY COMPANY v. POOLE CORPORATION.

it was alleged that the appellants, being owners of twelve houses in Ringwood Road, Longfleet, within the district of the said authority, did unlawfully permit the said premises to be in such a state as to be a nuisance or injurious to health, and did unlawfully make default in complying with the requisitions contained in a notice, served upon them by the respondents, requiring them to abate the said nuisance within the time therein specified, contrary to the statute in such case made and provided.

The following facts were admitted or proved. The borough of Poole consists of an extensive area, partly urban and partly rural in its character. The appellants were owners of twelve dwelling-houses, which abutted upon a highway known as Ringwood Road, in Longfleet, within that part of the borough which bore a rural character. In 1892 a plan was deposited with the respondents, which provided for the draining of the houses into cesspools at the rear of the houses, and it appeared from the plan that it was deposited on behalf of William Carter, the then owner of the houses, and in 1896 the business of Carter was incorporated, under the Companies Acts, under the name of the appellant company, and the houses had since formed part of their property. In erecting the houses the plans were departed from, in that the cesspools at the rear of the houses were not constructed. The respondents, as the highway authority for the borough, had previously to 1892 laid down, at the side of the highway upon which the appellants' houses abutted, a drain, for a distance of 123 yards or thereabouts, for the purpose only of receiving the surface water from the highway, which surface water was by means of the drain conveyed to, and emptied into, an open ditch by the side of another highway, about forty-nine yards distant from the appellants' houses. Shortly after the houses had been built the respondents gave permission to turn the rain water from the houses into the surface-water drain by the side of the

struction of any structural convenience, or where there is no occupier of the premises, notice under this section shall be served on the owner."

By s. 95, on non-compliance with a notice the local authority can lay a complaint before a justice, and a summons shall issue.

highway, but no permission had been given to turn the slop and scullery water from the houses into the surface-water drain. Notwithstanding no permission having been given, the appellants, or their predecessors in title, did in fact turn the slop and scullery water from the houses into the surface-water drain, which emptying into the open ditch became offensive, especially in the summer months, and caused a nuisance to arise, and the respondents had by formal notice required the appellants to abate the nuisance by constructing cesspools to receive the scullery and slop water from the houses, which notice and requirements had not been complied with. In the borough of Poole there were other houses, of which the appellants were not the owners, from which the slop water had been permitted to run into the surface-water drains, where there were periodical flushings, without any proceedings being taken by the respondents. The respondents had not made or constructed any sewer, by means of which the appellants could drain the slop and scullery water. A system of drainage had been carried out by the respondents in parts of their district, and the nearest point to the houses to which a main sewer had been brought by the respondents was distant about half a mile therefrom, and no steps had been taken to extend the main sewer. Notice to abate the nuisance had been duly served on the appellants, which notice had not been complied with.

It was contended on behalf of the appellants that the scullery and slop water from the premises did not alone cause the nuisance (if any existed) of which the respondents complained, and that the Public Health Act, 1875, imposed upon the respondents the obligation of making all necessary sewers for effectually draining the district.

It was contended by the respondents that the drain in question was constructed solely for the purpose of carrying off only surface water from the highway, and that the appellants were not entitled to use the drain for the purpose of carrying off the scullery and slop water from the twelve houses.

The respondents admitted that the houses were separately occupied, and were not within the same curtilage, but they

1899

KINSON POTTERY COMPANY v. POOLE CORPORATION.

denied that the appellants were entitled to drain into the drain and ditch, and it was contended that by so doing they caused the nuisance, and that an order should be made upon them to disconnect the scullery drains of the twelve houses from the surface-water drain. The respondents moreover contended that a discretion rested in them, as to what portion or portions of their district could be most effectually drained by means of sewers, and that it was no defence for the appellants to say that the authority was bound to provide every portion of their district with a sufficient sewer, under s. 15 of the Public Health Act, 1875 (1), nor, considering the character of the locality, a sewer for the purpose of receiving the scullery and slop water from the appellants' houses.

The justices, being of opinion that the drain in question, being constructed by the respondents for the sole purpose of receiving the surface water from the highway, could not lawfully be used by the appellants to carry off scullery and slop water from their houses, and that the appellants had created the nuisance in the open ditch, into which the surface-water drain discharged, and that, considering the nature of the locality, the respondents had a discretionary power, whether to construct a sewer or not for the purpose of taking off slop and scullery water from the appellants' houses, gave their determination against the appellants, and made the order asked for by the respondents.

The question for the opinion of the Court was, whether the order made upon the appellants, to abate the nuisance by disconnecting the scullery drains of the twelve houses from the surface-water drain, so as to prevent scullery and slop water from being discharged through it, and to make cesspools for each house to receive the scullery and slop water, was good in law.

Macaskie, for the appellants. The order of the justices was wrong. In the first place the drain, which is called in the case

(1) 38 & 39 Vict. c. 55, s. 15: "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

the "surface-water drain," is not a "drain," but a "sewer," within the meaning of the definition contained in the Public Health Act, 1875, s. 4 (1), for it is not used for the drainage of one building only, or of premises within the same curtilage, and therefore, by s. 13, it is vested in the respondents, and, by s. 21, the appellants are entitled to cause their drains to empty into it (2): *Acton Local Board* v. *Batten* (3); *Wheatcroft* v. *Matlock Local Board* (4); *Travis* v. *Uttley* (5); *Geen* v. *Newington Vestry*. (6)

Secondly, if there is any nuisance, it is caused by the default of the respondents themselves, in omitting to make such sewers as were necessary for effectually draining their district, as required by the Public Health Act, 1875, s. 15. (7) By taking these proceedings the respondents are endeavouring to cast upon the appellants the obligation to execute works for which the respondents themselves are responsible, and the authorities clearly establish that they are not entitled to do this: *Kirkheaton Local Board* v. *Beaumont* (8); *Kirkheaton Local Board*

(1) By 38 & 39 Vict. c. 55, s. 4, "'Drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed;

"'Sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies" (with another exception not material to the argument).

(2) 38 & 39 Vict. c. 55, s. 13: "All existing and future sewers within the district of a local authority, together with all buildings, works, materials, and things belonging thereto" (with certain exceptions not here material) "shall vest in and be under the control of such local authority."

Sect. 21: "The owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority, on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by that authority to superintend the making of such communications."

(3) (1884) 28 Ch. D. 283.

(4) (1885) 52 L. T. (N.S.) 356.

(5) [1894] 1 Q. B. 233.

(6) [1898] 2 Q. B. 1.

(7) See the section, ante, p. 44, note (1).

(8) (1888) 52 J. P. 68.

1899

KINSON POTTERY COMPANY v. POOLE CORPORATION.

v. *Ainley* (1); *Fordom* v. *Parsons* (2); *Reg.* v. *Tynemouth Rural Council.* (3)

Thirdly, the nuisance does not arise from the act, default, or sufferance, of the appellants, for which they can be held liable. The connection of the drains from the houses with the so-called "surface-water drain" having been acquiesced in for some years, the appellants ought not to be ordered to disconnect them. The houses being occupied by tenants, it is not in the power of the appellants to carry out the order of the justices, and this shews that the order ought not to have been made: *Attorney-General* v. *Dorking Guardians.* (4)

Clavell Salter (*Foote, Q.C.*, with him), for the respondents. As to the first point, the appellants cannot succeed unless they establish, not only that the "surface-water drain" was a "sewer," but that it was a sewer into which they were entitled to discharge the slop and scullery water. They can only have that right by s. 21, and no notice under that section is shewn to have been given. The argument for the appellants comes to this, that any one may empty foul water into a ditch by the side of a road.

As to the second point, the justices were right in holding that the respondents had a discretion as to constructing sewers. They cannot be bound to bring a sewer within reach of every outlying cottage in their district. *Kirkheaton Local Board* v. *Ainley* (1) is distinguishable, for that was a case of an order under the Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 10, which is discretionary in its terms, whereas s. 94 of the Public Health Act, 1875, is imperative. In *Fordom* v. *Parsons* (2) the drain had been used for twenty years, and the sanitary authority were clearly in default.

As to the third point, the words of s. 94 are "by whose act, default, or sufferance, the nuisance arises or continues." Here the nuisance continued, if it did not arise, from the act, default, or sufferance, of the appellants. The nuisance arose from the want of a structural convenience, and therefore, by

(1) [1892] 2 Q. B. 274.
(2) [1894] 2 Q. B. 780.
(3) [1896] 2 Q. B. 451.
(4) (1882) 20 Ch. D. 595.

s. 94, the appellants, as owners, were liable. [He also referred to the judgment of Bruce J. in *Russell* v. *Knight and M'Donald*. (1)]

Macaskie, replied.

DARLING J. I am of opinion that the conclusion at which the justices have arrived is right. I think that what was complained of by the respondents as a nuisance did arise from the want of some structural convenience, within the meaning of the Public Health Act, 1875, s. 94, for, if cesspools had been made for the slop and scullery water coming from the appellants' houses, that water would not have got into the surface-water drain made by the respondents, and no nuisance would have arisen. The slop and scullery water got into the drain owing to the want of a structural convenience, for if proper cesspools had been constructed at the rear of the defendants' houses, as shewn on the original plan, those cesspools would have taken the slop and scullery water, and the nuisance complained of could not possibly have arisen. Then it is contended that the appellants are not liable, because, after the slop and scullery water had got off the premises of the appellants, it got into the surface-water drain, which was a sewer belonging to the respondents, and for which they were liable. I agree that for certain purposes the surface-water drain was a sewer, but it is contended that therefore the appellants have a right to turn into it any refuse they please, and then it is for those who own the sewer to deal with the state of things so caused. In my opinion that is not the law. Sect. 21 of the Public Health Act, 1875, entitles an owner to cause his drains to empty into the sewers of a local authority, on giving notice, and complying with the local authority's regulations; but that does not entitle an owner to empty all kinds of filth into a small roadside drain, and leave the local authority to deal with it as best they can, and moreover here no notice was shewn to have been given. To hold otherwise would lead to an absurd result; and, whether notice had been given or not, I do not think that the appellants had a right, under the general law, independently of the

(1) *The Times*, May 9, 1894.

1899

KINSON POTTERY COMPANY v. POOLE CORPORATION.

permission referred to in the case, to turn into the surface-water drain even rain water, and still less had they a right to turn into it slop and scullery water, as to which no permission had been given. Our decision therefore must be in favour of the respondents.

CHANNELL J. I am of the same opinion. The only point as to which I feel any doubt is whether the appellants were the right people to proceed against. I agree absolutely with what Darling J. has said as to the absurd result which would follow from holding that the appellants in the present case were justified in what they did. The decision in *Meader* v. *West Cowes Local Board* (1) seems to be in point. It was there contended that a pipe drain, which drained ten cottages into a cesspit on the plaintiff's own land, constituted a sewer, within the meaning of the Public Health Act, 1875, and that the cesspit was part of the sewer, and that, being a sewer, it was vested in the local board under s. 13, and that the local board was bound to keep the sewer so as not to be a nuisance. This contention was rejected by Chitty J., and his judgment was affirmed by the Court of Appeal. The argument for the appellants in the present case amounts to this, that any one, if he finds a drain in a highway, can turn his sewage into it, and say that it is a sewer, and vested in the local authority, who are liable for the consequences, while he himself escapes liability. It is contended that this surface-water drain was a sewer, and I think it was for some purposes. It was intended to carry off mere surface water, yet it was a "sewer," within the words of the definition contained in s. 4 of the Public Health Act, 1875. But to entitle the appellants to succeed, it would be necessary to go further, and shew that it was a sewer which the appellants had a right to use as they did. If they had any such right, it could only be by s. 21, which requires notice to be given. I do not wish to say that if notice had been given in pursuance of that section, there would have been a right to empty the slop and scullery water into this surface-water drain, for I agree that it is unnecessary

(1) [1892] 3 Ch. 18.

to decide that question; but here no notice was given. I think the appellants cannot lawfully empty sewage into a mere water sewer. It is said that there was default on the part of the sanitary authority, because by s. 15 they were bound to sewer the district. But that section does not mean that they are bound to provide a sewer for every house in the district, for instance for an outlying cottage. I think there was no obligation here cast on the local authority to provide a sewer at this part of their district. If the appellants were dissatisfied they could have appealed to the Local Government Board. (1) The point, on which I feel some doubt, is, whether or not the appellants were the right persons for the local authority to proceed against. The appellants did not make the scullery drains which were complained of, and they do not use them; but I think the nuisance arises from the want of a structural convenience, within the meaning of s. 94, though, as I have said, on this point I feel some little doubt.

Judgment for the respondents.

Solicitor for appellants: *J. E. S. King, for J. Tattersall, Bournemouth.*

Solicitors for respondents: *Prior, Church & Adams, for P. E. L. Budge, Poole.*

(1) 38 & 39 Vict. c. 55, ss. 268, 299.

P. B. H.

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1899
April 14.

In re FROST.
Ex parte OFFICIAL RECEIVER.

Bankruptcy—Assignment of Dividend—Right of Assignee to Demand Payment from Trustee—Creditor—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 58, 63, *Forms* 122 (*a*), 126.

Certain creditors of a bankrupt, whose proofs had been allowed in the bankruptcy, assigned their debts to the respondent, who applied to the county court in which the bankrupt's estate was being administered for an order under s. 63 of the Bankruptcy Act, 1883, that the trustee should pay to the respondent the dividend payable in respect of the debts so assigned:—

Held, that there was no jurisdiction to make the order.

APPEAL from the county court of Kent holden at Greenwich.

On December 31, 1887, a receiving order was made against George Frost and William David Frost, trading as wholesale confectioners at Woolwich. A dividend of 3*s.* 5¾*d.* in the pound was distributed among the joint creditors. On June 18, 1888, the trustee was released, and the official receiver thereupon became trustee. In May, 1898, the official receiver as trustee received a sum which enabled him to declare a further dividend of 3*d.* in the pound. On December 16, 1898, Alice Maud Frost, the wife of the debtor William David Frost, having obtained from forty of the creditors who had proved in the bankruptcy, and whose proofs had been admitted by the trustee, an assignment of their debts to herself, and having given notice in writing of such assignment to the official receiver, applied for and obtained from the registrar of the Greenwich County Court an order under s. 63 of the Bankruptcy Act, 1883, ordering the official receiver as trustee to pay to her the dividend payable in respect of the several debts so assigned to her by the said forty creditors.

The official receiver appealed.

Muir Mackenzie, for the official receiver. There was no jurisdiction to make the order. Dividends can only be dis-

1899

FROST, *In re.* OFFICIAL RECEIVER, *Ex parte.*

tributed amongst the creditors who have proved. They alone can give a receipt. An assignee of a creditor cannot. By s. 58, sub-s. 1, of the Bankruptcy Act, 1883, the trustee is to "declare and distribute dividends amongst the creditors who have proved their debts"; and by sub-s. 5 he is to send to each creditor who has proved a notice shewing the amount of the dividend, and when and how it is payable. According to form 126, which is the form of notice of dividend and of receipt, the receipt is to be signed with the "creditor's signature." All payments of dividend have to be made through the finance department of the Board of Trade: s. 74, sub-ss. 3, 7.

By rule 225 (*a*) the trustee is to send certified lists of proofs to the Board of Trade. By regulation 30 of the Board of Trade circular—Audit Regulations—of December, 1890, "the payment of dividends will in every instance . . . . be made by cheques on the Bank of England or money orders, which will be prepared by the Board of Trade on the application of the trustee (form 122 (*a*)), and will be transmitted to him for distribution amongst the creditors." According to form 122 (*a*), the application of the trustee for issue of cheques for dividend is to be annexed to the certified list of proofs, which shews that the cheques are to be made out only in the names of creditors who have proved.

[He was stopped.]

A. Powell, for Mrs. Frost. It is true that the Act speaks only of "creditors," but that term is necessarily somewhat elastic. It cannot be read as excluding all assignees of creditors. If a creditor were to die after proof admitted, his personal representatives would be entitled to require payment of the dividend to them, and could give a valid receipt. So, too, if the creditor became bankrupt, his trustee would be entitled to stand in his shoes. The word "creditor" means "creditor or his assignee." And no distinction can be drawn between one kind of assignee and another. It is contended on the other side that to require the Board of Trade to recognise assignments of debts would be productive of inconvenience. That might be so in some cases. Here it would be the reverse, for the Board of Trade would only have to compute the dividend in respect of the sum of the

1899

FROST, *In re.* OFFICIAL RECEIVER, *Ex parte.*

forty debts instead of computing it on each debt separately, and would have to draw one cheque only instead of forty.

WRIGHT J. There is no doubt that Mrs. Frost is entitled to this dividend; the only question is how she ought to get it. Now by the rules, and, I should think, quite apart from the rules, on legal principles no action would lie for this dividend against the trustee, and payment of it therefore can only be enforced in the way provided by the statute, and the only section under which it is suggested that it can be enforced is that which says that the Court may order the trustee to pay. But the Court in making an order under that section ought to look at the framework and the intention of the Act; and it seems to me that the whole framework and intention of the Act and rules is that payment of dividends in the bankruptcy shall be made to the persons ascertained to be creditors in and by the bankruptcy proceedings, and that it is intentionally provided by the rules and forms that the Board of Trade is not to be called upon to recognise any persons except those who are so ascertained. It is obvious that if the trustee is to be required to recognise the rights of assignees the administration of bankrupts' estates might be incumbered with inquiries of a most embarrassing character, which it can never have been intended by the Legislature should be undertaken. The true view seems to me to be that the assignee in a case like the present should be allowed to prove and to have his proof substituted for that of his assignor. In such a case the assignee has, of course, to go to expense and trouble in getting his proof admitted and substituted for the existing proof; but I think it lies upon him to take that step unless he can get the assignor to sign an authority to the trustee to pay.

BIGHAM J. The respondent in this case is the assignee of certain debts due by the bankrupts, and as such is undoubtedly entitled in some way to receive the dividends in respect of those debts. Now she says she is entitled to recover them by requiring the official receiver as trustee to make out cheques for those dividends in her favour. I am of opinion that she is

not entitled to receive them in any such way. I think the case is entirely governed by s. 58, sub-s. 1, which points out how dividends are to be distributed, namely, amongst the creditors who have proved their debts. The respondent in this case has proved no debt at all; therefore, in my opinion, she does not come within the category of persons who are entitled to receive dividends from the trustee. She has no doubt a right to require the creditors who have assigned their debts to her to hand over to her the cheques which they may receive from the trustee, or the proceeds of those cheques. And she has probably, as my brother Wright has suggested, a right to put upon the file a proof to stand in the place of the proofs made by her assignors. If she does that she will become a creditor who has proved her debt within the meaning of s. 58, sub-s. 1, and will then, though not till then, be entitled to receive from the trustee the money which he has to distribute in respect of the debts assigned. The appeal must be allowed.

Appeal allowed.

Solicitor for official receiver: *Solicitor to the Board of Trade.*

Solicitor for respondent: *H. Toomer.*

J. F. C.

1899
April 17.

In re DAWSON.
Ex parte DAWSON.

Bankruptcy—Execution Creditor—Levy by Sheriff—Bankruptcy of Judgment Debtor—Tools of Trade—Small Debts Act, 1845 (8 *&* 9 *Vict. c.* 127), *s.* 8—*Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 44, 54—*Bankruptcy Act*, 1890 (53 *&* 54 *Vict. c.* 71), *s.* 11.

A sheriff seized the goods of a judgment debtor under a writ of fi. fa. at the suit of a judgment creditor for more than 20*l.*, and advertised them for sale, except the debtor's tools of trade, &c., to the value of 5*l.*, as provided by s. 8 of the Small Debts Act, 1845. Before the sale a receiving order was made against the debtor, and thereupon he claimed that, by virtue of s. 44 of the Bankruptcy Act, 1883, his tools of trade, &c., to the value of 20*l.* were excepted from the sale. The official receiver made no request to the sheriff under s. 11 of the Bankruptcy Act, 1890, and declined to interfere:—

Held, (1.) that s. 8 of the Small Debts Act, 1845, was in no way modified or extended by s. 44 of the Bankruptcy Act, 1883; and (2.) that the sheriff was bound to sell, and under s. 11 of the Bankruptcy Act, 1890, to hand over the proceeds of sale, less costs of execution, to the official receiver, although, had there been no sale, the debtor would have been entitled under s. 44 of the Bankruptcy Act, 1883, to his tools of trade, &c., to the value of 20*l.*

MOTION by the bankrupt to restrain the sheriff from selling certain chattels taken in execution under these circumstances.

On February 6, 1899, the sheriff, under a writ of fi. fa. issued by a judgment creditor for more than 20*l.*, seized certain goods at the premises of Dawson, the judgment debtor, who was a farrier. The goods seized included the debtor's tools of his trade, a pony and cart, and furniture; but the sheriff excepted from the levy certain tools of trade, &c., of the debtor to the value of 5*l.*, as provided by the Small Debts Act, 1845, s. 8. (1)

On February 11 the goods seized were claimed by the debtor and his wife. The sheriff interpleaded, with the result that the

(1) The Act 8 & 9 Vict. c. 127, s. 8, provides that "the wearing apparel and bedding of any judgment debtor or his family, and the tools and implements of his trade, the value of such apparel, bedding, tools and implements not exceeding in the whole the value of 5*l.*, shall not be liable to seizure under any execution or order of any Court against his goods and chattels."

1899

DAWSON, *In re.* DAWSON, *Ex parte.*

claims of the debtor and his wife were barred. The sheriff then sold the pony and cart, and advertised the remaining goods seized for sale by public auction on March 12.

On March 8 a receiving order was made against the debtor on his own petition, and the same day he consented to adjudication. He then claimed that under s. 44 of the Bankruptcy Act, 1883 (1), he was entitled to tools of his trade, &c., to the value of 20*l.*, and applied to the Court for an injunction to restrain the sheriff from selling the same accordingly. The official receiver had made no request for the goods under s. 11 of the Bankruptcy Act, 1890, and declined to intervene.

Lailey, for the motion. The sheriff contends that, so long as he leaves goods to the value of 5*l.*, he can proceed with the execution; but his rights and duties are qualified and restricted when bankruptcy supervenes before the sale. By s. 54 of the Bankruptcy Act, 1883, all the property of the bankrupt vests on adjudication in the official receiver, except tools of trade, &c., to the value of 20*l.*, which by s. 44 of that Act are reserved to the bankrupt, and this latter enactment qualifies and extends s. 8 of 8 & 9 Vict. c. 127; and the sheriff's power of sale is restricted by s. 11 of the Bankruptcy Act, 1890. It is true that the official receiver has not requested the sheriff to deliver up the goods seized; but a sale will not now benefit the execution creditor. He must prove in the bankruptcy for his judgment debt.

[WRIGHT J. Nothing vests in the official receiver except what is defined by ss. 43 and 44 of the Bankruptcy Act, 1883, as the property of the bankrupt divisible amongst his creditors. Therefore the property in the bankrupt's tools of trade, &c., to the value of 20*l.*, is not taken away from the sheriff.]

The policy of the Bankruptcy Act, 1883, is to protect for the benefit of the bankrupt the tools of his trade, &c., to the value

(1) The Bankruptcy Act, 1883, s. 44, enacts that the property of the bankrupt divisible amongst his creditors, in the Act referred to as "the property of the bankrupt," shall not comprise (inter alia):—

"The tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding 20*l.* in the whole."

1899

DAWSON, *In re.* DAWSON, *Ex parte.*

of 20*l.* This protection will be rendered nugatory if the sale proceeds, and the execution creditor will gain nothing by it, because the sheriff will be bound by s. 11 of the Bankruptcy Act, 1890, to hand over the proceeds of his sale to the official receiver. The result will be that the bankrupt will be deprived of his property, and his trade will be stopped.

P. Rose-Innes, for the sheriff. In consequence of the interpleader proceedings the proceeds of the pony and cart are not sufficient to pay all the sheriff's costs. Sect. 44 of the Bankruptcy Act, 1883, in no way modifies or extends s. 8 of the Small Debts Act, 1845. As the official receiver has not given the sheriff any notice under s. 11 of the Bankruptcy Act, 1890, it is the duty of the sheriff to proceed with his writ and to sell: *Trustee of Woolford's Estate* v. *Levy* (1), although he may have to hand over the proceeds of sale, less his costs, to the official receiver.

Lailey, in reply.

WRIGHT J. This is a point of some importance. What happened was this. There was judgment against a debtor and execution was levied on his goods. Thereupon the rights of the execution creditor, the sheriff, and the debtor became fixed, subject to bankruptcy supervening. Up to the time when bankruptcy supervened the only right of the debtor was to retain tools of his trade and certain other articles to the value of 5*l.*, and the question is whether a greater right has been given to him now that he has become bankrupt. No doubt the Legislature has taken a view more favourable to a bankrupt than to an execution debtor with respect to tools of trade and other articles mentioned in s. 44 of the Bankruptcy Act, 1883, and I have to consider whether the bankruptcy of the judgment debtor in any way alters the position of the sheriff. I do not think it does until the official receiver or trustee intervenes under s. 11 of the Bankruptcy Act, 1890. That section points out the duties of the sheriff. He is bound to go on with the execution and sell, unless he is stopped by a request for the goods from the official receiver; and if he sells he must hand

(1) [1892] 1 Q. B. 772.

over the proceeds to the official receiver, and being no longer tools they will remain his property. He cannot reconvert them into tools, although the tools had they not been sold could not have passed to the official receiver by virtue of s. 44 of the Bankruptcy Act, 1883. It is a curious and anomalous result; still, as the law now stands, I must decide in favour of the sheriff. The application must be dismissed with costs.

1899

DAWSON, *In re.* DAWSON, *Ex parte.*

Wright J.

Solicitor for debtor: *G. B. Crook.*
Solicitors for sheriff: *W. & T. Burchell.*

H. L. F.

In re TANKARD. *Ex parte* THE OFFICIAL RECEIVER.

1899 *March* 20; *April* 25.

Bankruptcy—Voluntary Settlement—Gift of Jewels and Money—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

Gifts of personal property made by a bankrupt within two years of his bankruptcy, without restricting the donee's power of alienation, but with intention that the donee shall use or retain the property for an indeterminate time, are voluntary settlements within the meaning of s. 47 of the Bankruptcy Act, 1883, and void as against the trustee in bankruptcy, but without prejudice to any sale or disposition of the property made by the donee before the bankruptcy in good faith and without notice of an available act of bankruptcy. But the donee may have to account for the proceeds of any such sale or disposition remaining in his hands at the commencement of the bankruptcy.

In re Player, (1885) 15 Q. B. D. 682, and *In re Vansittart*, [1893] 1 Q. B. 181, considered.

MOTION by the trustee in bankruptcy for a declaration that certain voluntary gifts or transfers of property made by the bankrupt within two years of his bankruptcy were void as against him.

In 1896 the bankrupt acquired the lease of a house in Curzon Street, Mayfair, at a rent of 325*l.* per annum. In June, 1897, he made over the lease at a nominal sub-rent to a lady with whom he was on terms of intimacy, and at the same time he gave her all the furniture and pictures in the house, which were valued at 3000*l.* or 4000*l.* During 1897 and 1898 he

1899

TANKARD, *In re.* OFFICIAL RECEIVER, *Ex parte.*

made her presents of jewellery amounting to several thousands of pounds, including a pearl necklace costing 2350*l.* In July, 1898, he gave her about 1000*l.* to buy furniture for a house she had taken at Maidenhead, and it was purchased accordingly. On February 4, 1899, a receiving order was made against the bankrupt, adjudication followed, and the official receiver became the trustee in bankruptcy. The lease was given up by the lady and disclaimed by the trustee; but she claimed the furniture, necklace, and other jewellery as her absolute property, and the trustee applied to the Court as above stated. The lady alleged that since the bankruptcy she had sold the necklace for 700*l.*, and applied the proceeds to pay debts for which the bankrupt was liable.

Reed, Q.C., and *Carrington*, for the motion. By s. 47 of the Bankruptcy Act, 1883, a "settlement" for the purposes of the section is defined as any conveyance or transfer of property. No doubt, every trifling gift by a debtor within two years of his bankruptcy is not a settlement, nor would an out and out gift be within the section. But these gifts were intended by the bankrupt to be retained by the lady for her personal use and enjoyment: *In re Player* (1); *In re Vansittart.* (2)

Rufus Isaacs, Q.C., and *J. Henderson*, for the lady. In order to come within the section the transaction must be in its nature a settlement—that is, the gift must be intended to be preserved or retained. That is the principle of the cases cited. A gift of money to be expended at once is not a settlement. The question, therefore, here is, were these gifts intended to be retained, or were they gifts for her to do what she liked with? On the evidence, they were out and out gifts to her.

Reed, Q.C., in reply.

Cur. adv. vult.

April 25. WRIGHT J., after stating the facts, continued:—The bankrupt and the lady have been examined before me. I have no doubt that the proper conclusion of fact is that, on the one hand, there was no stipulation or reservation restricting the

(1) 15 Q. B. D. 682. (2) [1893] 1 Q. B. 181.

lady's power or right to alien the property, but, on the other hand, the bankrupt's intention was that it should be kept and used by her until necessity might require her to dispose of it. There is no evidence or suggestion of any trust for the donor. The lease has been given up to the trustee and disclaimed by him. I have to determine whether s. 47 of the Bankruptcy Act, 1883, applies in the case of the other gifts.

I think that I am bound by the authority of *In re Player* (1) and *In re Vansittart* (2) to hold that that section applies only to such conveyances or transfers as are in the nature of settlements, in the sense of being dispositions of property by a person to be held and preserved for the enjoyment of some other person. The retention of the property in some sense must according to those cases be contemplated, and not its immediate alienation or consumption. But it is not necessary, according to those authorities, that there should be any actual restriction of the power of alienation by the donee. Accordingly, the section was held to apply to a gift of money by a father to his son to be spent in buying shares on which the son was to receive the dividends, although there was nothing to prevent the son from selling the shares immediately: *In re Player* (1); and in *In re Vansittart* (2) it was held to apply to a gift of diamonds by a husband to his wife, an inference being drawn that the retention of the diamonds by her was contemplated, although no restriction upon the power of alienation was expressed or understood. In the present case I draw a similar inference, and think that the pearl necklace and other jewellery, and the furniture or money to buy furniture, were given and received with the intention that the necklace, jewels, and furniture should be kept for enjoyment by the donee for an indeterminate time, and that the section, even as so construed, applies. But for the decision in *In re Player* (1) I should have thought that in s. 47 the word "settlement" ought to be construed in accordance with sub-s. 3, as including every kind of conveyance or transfer of property (which term by virtue of s. 168 includes money), the word "settlement" in the earlier part of the section being apparently used merely for convenience

(1) 15 Q. B. D. 682. (2) [1893] 1 Q. B. 181.

1899

TANKARD, *In re.* OFFICIAL RECEIVER, *Ex parte.*

Wright J.

of drafting. And this seems to have been the view of the Court of Appeal in *In re Farnham* (1), where Lindley L.J. said: "It was admitted on all hands, looking to the last words of that section, that any gift of property is void as against a trustee in bankruptcy"; and *In re Carter and Kenderdine's Contract* (2), where the same learned judge said: "this s. 47 according to its terms hits a conveyance or transfer of property of any sort." Upon this construction of the section, any voluntary alienation by a person would, in the event of his becoming bankrupt within two years, become undone as from the date of the bankruptcy, and the property would from that date revest in the alienor, and therefore in the trustee in his bankruptcy, but not so as to undo or affect any transfer or charge acquired by any person bonâ fide and for valuable consideration before the bankruptcy: *In re Holden* (3), per Cave and A. L. Smith JJ.; *In re Vansittart* (4) and *In re Brall* (5), per Vaughan Williams J.; and *In re Carter and Kenderdine's Contract* (2) in the Court of Appeal. And I conceive, though there seems to be no authority on the point, that neither the original alienee, nor the transferee from him, could be required to restore money which he has spent or property which he has aliened before the bankruptcy, and without notice of any act of bankruptcy (or, perhaps, without knowledge of insolvency), though the alienee probably is liable to account for any proceeds which remain in his hands at the time of the bankruptcy—at any rate, if the acquisition by him of those proceeds was an object of the gift to him so that the proceeds can properly be said to represent the gift. And, if this is the proper view of the meaning and consequences of the section, the inconveniences which seem to have been apprehended in *In re Player* (6) would not occur. There would be no hardship in making the donee of a voluntary gift surrender what remains in his hands free of any charge or equity. If, however, this is not the proper construction of the section, it seems difficult to avoid the conclusion that "settlement" ought to be understood to mean such a conveyance or

(1) [1895] 2 Ch. 799.
(2) [1897] 1 Ch. 776.
(3) (1887) 20 Q. B. D. 43.
(4) [1893] 2 Q. B. 377.
(5) [1893] 2 Q. B. 381.
(6) 15 Q. B. D. 682.

transfer as of itself limits the power of alienation by the donee and so preserves the fund, rather than to mean something so vague as to be satisfied by a gift which the donee is intended or expected to keep, but is free to alien. The decision, however, in *In re Player* (1) does not seem to have been expressly questioned in *In re Farnham* (2) or in *In re Carter and Kenderdine's Contract* (3), and it was before those cases followed, though apparently with some difficulty, by Vaughan Williams J. in *In re Vansittart.* (4) It is strange that, although somewhat similar enactments have existed in Bankruptcy Acts from (1604) 1 Jac. 1, c. 15, s. 5, which was in substance re-enacted by 6 Geo. 4, c. 16, and by the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), there were hardly any decisions upon their construction. The few reported cases appear to be three or four to the same effect as *Kensington* v. *Chantler* (5), where Lord Ellenborough said that "the statute had not the word money, and seemed to be confined to things which were the subject of conveyance and capable of being conveyed or procured to be conveyed; and that the doctrine contended for would go the length of making a son liable to refund every portion of money given to him by his father for his maintenance." The existing enactment dates from 1869, and was not the subject of judicial construction until *In re Player.* (1) The trustee is in the present case entitled to the order for which he asks, whether the law is as laid down in *In re Player* (1), or as suggested in *In re Farnham* (2); and if necessary there must be an inquiry as to the necklace.

Solicitors for trustee: *G. H. Barker & Son.*
Solicitors for respondent: *Wainwright, Pollock & Co.*

(1) 15 Q. B. D. 682.
(2) [1895] 2 Ch. 799.
(3) [1897] 1 Ch. 776.
(4) [1893] 1 Q. B. 181.
(5) (1813) 2 M. & S. 36.

H. L. F.

1899
May 2.

In re O'GORMAN.
Ex parte BALE.

Bankruptcy—Damages in the Divorce Court—Bankruptcy of Co-respondent—Provable Debt—Judgment Summons—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 33—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 10.

Damages awarded to a petitioner in the Divorce Court against a co-respondent, and ordered to be paid into court, although they will not support a bankruptcy petition against the co-respondent, are nevertheless a debt provable in his bankruptcy. The payment of such damages therefore cannot, if his bankruptcy supervenes, be enforced against him by a judgment summons under s. 5 of the Debtors Act, 1869.

JUDGMENT SUMMONS under the Debtors Act, 1869, which raised the question whether the payment of the damages awarded against a co-respondent in the Divorce Court could be enforced against him notwithstanding his bankruptcy.

On February 27, 1897, G. Bale obtained a decree nisi in the Divorce Court; and it was ordered that J. O'Gorman (the co-respondent) should pay into the registry within fourteen days the sum of 1250*l.*, the amount of damages assessed by the jury. O'Gorman did not comply with this order; and in October, 1897, he was adjudicated a bankrupt on his own petition, and the official receiver became the trustee.

On October 27, 1898, the decree nisi was made absolute.

On January 15, 1899, Bale obtained an order in the Divorce Court that the damages directed to be paid into the registry by O'Gorman by the decree of February 27, 1897, should be paid to the petitioner (Bale), he undertaking to bring the same into court when received by him.

On April 5, 1899, Bale took out the usual judgment summons against O'Gorman, founded on the order of February 27, 1897, which summons was adjourned into court. There was evidence that O'Gorman was earning a large weekly salary as a comedian. It was admitted that if the damages were a debt provable in the bankruptcy the summons could not be maintained.

1899

O'GORMAN, *In re.* BALE, *Ex parte.*

Carrington, for the summons. These damages are not a provable debt: Bankruptcy Act, 1890, s. 10. Bale is in the position of a receiver. He is a mere conduit pipe to receive the money and pay it into court. He cannot present a bankruptcy petition: *Ex parte Muirhead* (1); *Ex parte Sacker* (2); neither can he obtain a receiving order on this summons: *Ex parte Fryer*. (3) He is not a creditor within the meaning of the Bankruptcy Act, 1883. The petitioner asks for an order to pay the amount of the damages by instalments or for a committal. *Patterson* v. *Patterson* (4) may be relied on by the other side, but there the order was for payment direct to the petitioner himself; and in *Ex parte Harris* (5) the receiver held a bill of exchange. *Ex parte Langdale* (6) was apparently the outcome of *Patterson* v. *Patterson* (4), and does not seem to have been followed. Further, at the date of the receiving order, O'Gorman was under no obligation to pay the petitioner. There was only the decree nisi. The case is analogous to that where in an action for tort the defendant becomes bankrupt between the date of the verdict for damages and the judgment. In such a case the damages are not a provable debt: *In re Newman*. (7)

Cosmo Rose-Innes, for the respondent. The cases cited as to these damages not being a good petitioning creditor's debt do not apply. The order of February 27, 1897, was equivalent to a judgment, and created a liability on the part of O'Gorman which was an existing liability at the date of the receiving order, and was, therefore, a debt provable in his bankruptcy: *Wood* v. *Wood*. (8) In *Patterson* v. *Patterson* (4) it was not intended by the order, it is submitted, that the damages should belong to the petitioner beneficially, but that he should be placed in a position to prove for them.

Carrington, in reply, cited *In re Hawkins* (9) and *Kerr* v. *Kerr*. (10)

(1) (1876) 2 Ch. D. 22.
(2) (1888) 22 Q. B. D. 179.
(3) (1886) 3 Mor. 231.
(4) (1870) L. R. 2 P. & M. 189.
(5) (1876) 2 Ch. D. 423.
(6) (1871) 19 W. R. 951.
(7) (1876) 3 Ch. D. 494.
(8) (1868) L. R. 1 P. & M. 467.
(9) [1894] 1 Q. B. 25.
(10) [1897] 2 Q. B. 439.

1899

O'GORMAN, *In re.* BALB, *Ex parte.*

WRIGHT J. This is a case of great difficulty; but I do not see the possibility of any further light being obtained by reserving my judgment. I must therefore decide it in accordance with the principles primâ facie applicable to the case. It seems to me that when a party obtains a verdict and decree for damages against a co-respondent in the Divorce Court he does acquire some right, subject to the order of the Court, to the damages awarded to him. I think he ought to be said to be a creditor of the co-respondent in some sense, although he must submit to deal with the money as the Court shall direct. That, I think, is in accordance with the observations of Lord Penzance in *Wood* v. *Wood* (1), where he makes some strong observations about the damages being a provable debt in bankruptcy. It does not follow, however, that because he is a creditor in some degree of the co-respondent he can present a bankruptcy petition against him; and in *Ex parte Muirhead* (2) it was settled that such a party cannot be a petitioning creditor in respect of damages which the Divorce Court had ordered to be paid to him in order that he might pay them into the registry. But in deciding that, Cockburn C.J. uses language which is confined to the question before the Court, and held that, as the petitioner there was only in the position of a receiver, there was not a good petitioning creditor's debt. Then Mellish L.J. said, "I am entirely of the same opinion"; but at the close of his judgment he says, "I do not mean at all to express any dissent or any express opinion as to the effect of such an order for the purpose of enabling a proof to be made. As at present advised, I should rather think that there being a sum presently payable, and an order for its payment, it would in some shape be provable in bankruptcy, and that the mere uncertainty as to who was ultimately to receive it, and for whose benefit it was ultimately to be applied, would not prevent its being a provable debt"; and he goes on to point out that this uncertainty would prevent any particular person from being a good petitioning creditor in bankruptcy. Then comes the case of *In re Sacker* (3), where it was held

(1) L. R. 1 P. & M. 467. (2) 2 Ch. D. 22.

(3) 22 Q. B. D. 179.

that a receiver appointed in an action in the Chancery Division was not a "creditor" entitled to present a bankruptcy petition. I do not see, however, that that case carries the matter any further than the decision in *Ex parte Muirhead* (1), and it leaves the point I have to decide entirely open. It is quite true that Lord Esher M.R. (2) uses language which at first sight seems to shew that he did not think a receiver could be a creditor at all; but I do not think he meant that, but only that a receiver could not be a good petitioning creditor. Then Fry L.J. says (3), "Whether the receiver could prove in respect of this sum in the bankruptcy of Sacker it is not necessary now to consider. As a general rule, a receiver cannot maintain an action to compel obedience to an order for the delivery of goods or the payment of money to him by a party to the action"; and then he points out that there may be, no doubt, exceptional cases in which a receiver can bring an action in his own name—when, for instance, he is the holder of a bill of exchange. Nor does the decision in *Patterson* v. *Patterson* (4) really apply, because there the petitioner obtained an order which on the face of it gave him an absolute title to the damages. It seems to me, therefore, that the point now before me has been left entirely open, and I think that when a party has obtained damages in the Divorce Court against a co-respondent subject to any order of the Court appropriating them to any particular purpose, he has a debt or liability which is provable in the bankruptcy of the co-respondent. That being so, the damages in this case are a debt provable in the bankruptcy, and this application cannot be maintained. Then there is a second point. It is said that the first order was for payment into the registry, and that the second order for payment of the damages to the petitioner was not made until some months after the date of the receiving order in bankruptcy, and therefore that the so-called creditor had not at the date of the receiving order any interest in any debt, and therefore that he could not prove in the bankruptcy. But if I am right in the view I have expressed on the first point, I think

(1) 2 Ch. D. 22.
(2) 22 Q. B. D. at p. 184.
(3) 22 Q. B. D. at p. 185.
(4) L. R. 2 P. & M. 189.

1899

O'GORMAN, *In re.* BALE, *Ex parte.*

Wright J.

the contention on this second point fails. It is quite true that at the date of the receiving order there was no order of the Divorce Court that the damages should be paid to the petitioner, but there was an order of that Court directing payment of those damages by the co-respondent on which I think some proof could have been made in the bankruptcy by the petitioner. It is a matter of much importance on which I feel great doubt, and I should be glad if the case could be taken to the Court of Appeal.

Solicitors for applicant: *Amery, Parkes & Powell.*
Solicitors for respondent: *Wilson, Wallis & Co.*

H. L. F.

1899
May 13.

In re AN ARBITRATION BETWEEN F. TIEDEMANN AND LEDERMANN FRÈRES AND OTHERS.

Principal and Agent—Contract by Agent in Name of Principal, but for his own Benefit—Ratification by Principal.

Where an agent makes a contract purporting to sell goods in the name of a principal, but with the fraudulent intention of selling them on his own account and for his own benefit, it is competent for the principal to ratify and take the benefit of the contract as against the buyers.

SPECIAL CASE, stated in three arbitrations, under s. 19 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), for the opinion of the Court on a question of law.

The question raised in the three arbitrations was whether the claimant, F. Tiedemann, was entitled to damages from the defendants, Ledermann Frères, Baumann Frères, and Z. Levy et Fils, respectively, for breach of three contracts made with the defendant firms in similar terms and under similar circumstances, and dated April 27, 1898.

Each of such contracts contained a clause for arbitration, and it having been agreed by the various parties that the arbitrators should decide whether there was a valid contract on which F. Tiedemann could sue as well as the amount of damages (if any) for the breach of such contract, the claimant

and the defendants each appointed an arbitrator. The two arbitrators disagreed, and appointed an umpire.

The following material facts were found in the special case, one of the arbitrators, however, disagreeing with the findings of fact stated in paragraph 6 (post) :—

Franz Vilmar, of Berlin, in and before 1897, carried on business there as agent for P. H. Vilmar, of New York, under a power of attorney authorizing him, amongst other matters, to "enter into agreements for purchase, sale, and delivery, and to sign the same." On P. H. Vilmar retiring from business, F. Tiedemann, the present claimant, took over the business, and wrote on December 28, 1897, to F. Vilmar: "I also beg to confirm that you are to represent my firm on your side under exactly the same terms and conditions as you have formerly done for Mr. P. H. Vilmar." Such agency continued during 1898.

On April 12, 1898, F. Tiedemann by cable offered for sale 3000 quarters of wheat at 151 marks per 1000 kilos c.i.f. Hamburg. F. Vilmar sold this wheat, as agent for Tiedemann, to Muller and Heilemann at 151 marks c.i.f. Hamburg, and notified Tiedemann thereof on April 15, 1898.

The wheat market having risen, F. Vilmar, on April 27, 1898, repurchased this wheat from Muller and Heilemann at the price of 164 marks, net cash, settling the transaction by a cash payment to them of 8392 marks, and on the same day he resold this wheat, c.i.f. Rotterdam, as follows :—

1000 quarters @ 171½ to Ledermann Frères.
1000 „ @ 171½ to Baumann Frères.
1000 „ @ 171½ to Z. Levy et Fils.

All three contracts were made by Vilmar in the name of Tiedemann.

The 6th paragraph of the special case was: "We find as a fact that the above repurchase and resale were made by F. Vilmar on his own account, and that he used the name of Tiedemann in the resale, because the buyers, in consequence of previous transactions, had refused to deal with him personally for financial reasons."

On May 12, 1898, F. Vilmar wrote to Tiedemann: "During

1899

TIEDEMANN AND LEDERMANN FRÈRES. *In re.*

the excitement of the week I have bought back the following contracts, and sold against these c.i.f. Rotterdam." [Here three large quantities of wheat were described as sold for the following August 2, and they included the wheat repurchased from Muller and Heilemann and resold to the three defendant firms.] "I am willing to pay you for the switch M. 1½ per 1000 ko. for the whole or a part of the above contracts, and leave you this offer on hand for reply till end of this month. Cable reply from New York." (The "switch" referred to the diversion of the wheat to Rotterdam.)

Tiedemann wrote in reply, on May 23, 1898: "I note what you write with regard to these contracts. At present I am unable to make the switch at your premium because freight to Rotterdam is held higher than freight to Hamburg. Kindly let me know whether you wish me to continue working on the switch or whether you are going to arrange the matter yourself over there."

At the beginning of June, 1898, the wheat market fell, and the three defendant firms, suspecting that F. Vilmar had made the contracts with them on his own behalf, refused to carry them out.

Thereupon Tiedemann, on July 22, 1898, at F. Vilmar's request, purported to ratify and confirm the sale by F. Vilmar to the three defendant firms in his name, and forwarded the wheat for tender to them. They refused to accept it, and thereupon arbitration was claimed by Tiedemann against the three defendant firms, and damages for loss on resale of the wheat.

The question for the opinion of the Court was—whether, on the facts above stated, Tiedemann in July, 1898, could validly ratify and adopt the contracts of April 27, 1898, with the three buyers.

Jenkins, Q.C. (*Ward Coldridge* with him), for the claimant, F. Tiedemann. The question whether the claimant could or did ratify these contracts does not arise, because Vilmar had authority to make contracts for Tiedemann, and did in fact make them for him. Tiedemann was, therefore, bound by

them, and whether Vilmar intended to make them on his own account or not is immaterial.

Next, if a contract is made by a person purporting to act as agent for a principal, the latter may, at any reasonable time afterwards, ratify it. That proposition is maintained by reference to the judgments in *Bolton Partners* v. *Lambert* (1), where the earlier authorities to the same effect are cited and considered. The maxim "Omnis ratihabitio retrotrahitur et mandato priori æquiparatur" applies. The answer to the question asked in the case ought, therefore, to be that the claimant could ratify and adopt the contracts.

Bray, Q.C. (*E. Bray* with him), for the three defendant firms. In making the contracts of resale the use of F. Tiedemann's name by Vilmar, under the circumstances stated in paragraph 6 of the case, was a fraud upon the defendants, and as soon as they became aware of it they were entitled to rescind the contracts, and did so.

F. Tiedemann could not ratify the contracts. A principal cannot ratify a contract not made for him by the agent. There must be an intention by the agent to make the contract for his principal. The act of the agent must be done for the principal. In *Wilson* v. *Tumman* (2) Tindal C.J. (3) states the rule thus: "That an act done *for another* by a person not assuming to act for himself but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law." In *Foster* v. *Bates* (4) Parke B. said (5): "When one means to act for another, a subsequent ratification by the other is always equivalent to a prior command." In *Byas* v. *Miller* (6) Mathew J. said (7): "a voluntary agent must expressly intend to benefit the person for whom he acts." The case does not find that F. Vilmar rebought the wheat from Muller and Heilemann in his principal's name. So far as appears, therefore, he was selling his own wheat to the

(1) (1889) 41 Ch. D. 295.
(2) (1843) 6 M. & G. 236.
(3) 6 M. & G. at p. 242.
(4) (1843) 12 M. & W. 226.
(5) 12 M. & W. at p. 233.
(6) (1897) 3 Com. Cas. 39.
(7) 3 Com. Cas. at p. 42.

1899

TIEDEMANN AND LEDERMANN FRÈRES, *In re.*

defendants. A principal cannot ratify the sale of another person's goods. If Tiedemann could ratify these contracts, the ratification, to be valid, must be within a reasonable time: *Ramsgate Victoria Hotel Co.* v. *Montefiore* (1); *In re Bowron, Baily & Co., Ex parte Baily* (2); *In re Portuguese Consolidated Copper Mines, Limited, Ex parte Badman.* (3) The ratification here, being in July after the price of the wheat had fallen and after the defendants had refused to carry out the contracts, was not within a reasonable time.

Jenkins, Q.C., in reply. The cases cited for the defendants apply only where the agent in making the contract does not purport to act for the principal. Where he does purport so to act, the principal can ratify, even though the agent does not intend to make the contract for his benefit.

CHANNELL J. I have been asked by my brother Darling to deliver our judgment. We think that we should confine ourselves to deciding the question asked in the case—namely, whether on the facts stated Tiedemann in July, 1898, could validly ratify and adopt the contracts of April 27, 1898, with the three buyers. We think that he could, but we express no opinion upon the several other questions which have been discussed. We express no opinion upon the question whether or not any ratification was necessary—whether or not F. Vilmar did in fact make those contracts for Tiedemann. That question may have been already decided by the arbitrators; we say nothing about it. Nor do we express any opinion about the question whether in fact Tiedemann ever did ratify and adopt the contracts, or whether he only purported to do so. Nor do we decide whether a ratification in July was a ratification within a reasonable time, because the cases which were cited by Mr. Bray shew that the question is one of fact in each case, and all the circumstances in this case are not before us. We are of opinion that Tiedemann could validly ratify and adopt the contracts, and, first of all, that he could do so notwithstanding the previous repudiation of these contracts by the

(1) (1866) L. R. 1 Ex. 109. (2) (1868) L. R. 3 Ch. 592.
(3) (1890) 45 Ch. D. 16.

buyers. That point seems to be covered by the decision in *Bolton Partners* v. *Lambert.* (1) Next, it was said that he could not validly ratify or adopt the contracts because, although they purported to be made in his name, they were not really his contracts, being made by Vilmar on his own account, though in Tiedemann's name, with some fraudulent intent. That, however, in our view makes no difference, because in making the contracts Vilmar assumed to act on behalf of a principal, Tiedemann. Under those circumstances we think that the contracts could be validly ratified by the person in whose name they purported to be made, even although they were in fact made without his actual authority, and although Vilmar had in his mind some fraudulent intent. The contracts were contracts which could be made on Tiedemann's behalf, and were in respect of wheat which he had shipped to Hamburg and could divert to Rotterdam. They were, therefore, contracts which not only purported to be made by him, but which he had the means to carry out. We think that he had the right to say that he would carry them out. It is not found that Tiedemann was guilty of any fraud. If there was such a finding, the question would be altogether different; but there is nothing, in our opinion, found in the case to shew that he could not validly adopt and ratify these contracts.

DARLING J. concurred.

Judgment for the claimant on the question asked in the case.

Solicitor for claimant: *G. T. B. S. Thurnell.*
Solicitors for defendants: *Tilleards*

(1) 41 Ch. D. 295.

W. A.

C. A.
1899
May 4.

[IN THE COURT OF APPEAL.]

PENNY *v.* THE WIMBLEDON URBAN DISTRICT COUNCIL AND ANOTHER.

Negligence—Public Body—Contract to Execute Works—Negligence of Contractor — Liability of Employer — Practice — Separate Defence of two Defendants—Payment into Court by one Defendant—Verdict for less than Amount paid in—Liability of the other Defendant for Costs.

A district council, acting under the Public Health Act, 1875, s. 150, employed a contractor to make up a highway, which was used by the public, but had not become repairable by the inhabitants at large. In carrying out the work the contractor negligently left on the road a heap of soil, unlighted and unprotected. A person walking along the road after dark fell over the heap and was injured. In an action against the district council and the contractor to recover damages for the injuries sustained:—

Held, that as, from the nature of the work, danger was likely to arise to the public using the road, unless precautions were taken, the negligence of the contractor was not casual, or collateral to his employment, and the district council were liable.

Where two defendants are sued, and put in separate defences, and one of them has paid money into court exceeding the amount ultimately recovered in the action, the other defendant cannot avail himself of the payment into court by his co-defendant as a satisfaction of the cause of action against himself, and, on the failure of his defence, the plaintiff is entitled to have judgment entered against him for costs.

Judgment of Bruce J., reported [1898] 2 Q. B. 212, affirmed.

APPEAL from a judgment of Bruce J. on further consideration, reported [1898] 2 Q. B. 212.

The action was brought to recover damages for personal injuries sustained by the plaintiff by falling over a heap of surface soil and grass, placed in Queen's Road, Wimbledon, and left there on the evening of October 23, 1897, after dark, without any light, or precaution, to warn persons passing along the road of the obstruction caused by the heap.

The defendants were the Wimbledon Urban District Council and a contractor of the name of Iles employed by the council to make up the road. The two defendants put in separate defences, and both denied liability. Iles paid 75*l.* into court. The district council did not pay money into court, but stated

in their defence that "the defendant Iles, while denying liability, has paid into court 75*l.*, and these defendants say that sum is sufficient to satisfy the plaintiff's claim."

It appeared that at the time of the accident the district council had not taken over the road, but had served notice on the owner, under s. 150 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), to make up the road, and on his failure to do so had entered into a contract with the defendant Iles that he should do the work. By the terms of the contract Iles was to provide all materials, plant, labour, watching, lighting, fencing, and everything necessary for the speedy and effectual completion of the work, which was to be carried out in the best and most workmanlike manner, and was to be in accordance with a specification, and certain plans and drawings prepared by the surveyor of the district council, and such working and explanatory drawings and instructions as he might from time to time furnish. The surveyor could require improper materials to be removed and others substituted, and could procure the discharge of incompetent workmen. The work was commenced on the day before the accident, and the heaps which were left on the road were heaps of dirt and grass, formed in the course of the preliminary process of cleaning up the road. After the accident lights were placed on some of the heaps by order of the surveyor.

The jury found a verdict for the plaintiff, and assessed the damages at 50*l.* The learned judge directed judgment to be entered for the defendant Iles with costs, and, after argument on further consideration, he held that the district council could not avail themselves of the payment into court by Iles, and that their defence simply amounted to a denial of liability. Judgment was therefore entered against the district council, but it was confined to costs. (1)

The district council appealed.

Macmorran, Q.C., and *C. Tyrrell Giles*, for the appellants. The district council are entitled to have judgment entered in their favour. The cause of action against the two defendants

(1) [1898] 2 Q. B. 212.

C. A. 1899

PENNY v. WIMBLEDON URBAN COUNCIL.

is indivisible; the plaintiff is only entitled to get one set of damages, and when the money paid into court by one defendant has once been decided to be sufficient, the cause of action against the other defendant is gone. The plaintiff might have taken the money out in satisfaction; she did not do so, but proceeded with the action, with the result that the district council's defence, that the amount paid in by Iles was sufficient to satisfy the claim, has been established, and that is an answer to the claim so far as the district council are concerned. It cannot be that each defendant is to pay money into court, for, if the council had paid in the same amount as Iles, and the plaintiff had taken both sums out, she would have got three times the amount she was entitled to. If each defendant had paid in half of the 75*l.*, then, according to the judgment appealed from, neither of them would have succeeded in the action, although the whole amount to which the plaintiff was entitled by the verdict was only 50*l.* If the plaintiff had sued Iles and obtained judgment, and then had sued the council, they could have pleaded satisfaction by judgment recovered, and that is in effect what has happened though in one action.

[They cited on this point *Thurman* v. *Wild* (1); *Brinsmead* v. *Harrison* (2); *Duck* v. *Mayeu.* (3)]

As to the question of the liability of the district council, this is not the case of master and servant, but of the employment of an independent contractor, and the negligence of the contractor in leaving heaps of soil in the road was collateral to the work required to be done. For the consequences of casual or collateral acts of negligence, such, for instance, as leaving a pickaxe in the road, the employer is not liable. If the road had been improperly made, and so damage had arisen, the defendants would have been responsible; but to hold them liable in this case would be to make the liability of an employer the same whether he employed an independent contractor, or did the work by his own servants.

[They cited *Pickard* v. *Smith* (4); *Gray* v. *Pullen* (5); *Black*

(1) (1840) 11 Ad. & E. 453.
(2) (1872) L. R. 7 C. P. 547.
(3) [1892] 2 Q. B. 511.
(4) (1861) 10 C. B. (N.S.) 470.
(5) (1864) 5 B. & S. 970.

v. *Christchurch Finance Co.* (1); *Hardaker* v. *Idle District Council.* (2)]

Lord Coleridge, Q.C. (with him *Stephen Lynch*), was not called on

A. L. SMITH L.J. This is an appeal from a judgment of my brother Bruce, who tried the case with a jury, and one matter before us is whether one set of defendants, the Wimbledon District Council, should have judgment against them for costs. The facts are that the plaintiff was passing at night along a highway which was being made up by a contractor, the other defendant Iles, for the district council. There were some heaps of soil left thereon unfenced and unlighted, and the plaintiff was injured by falling over one of them. The action is brought against the district council and the contractor. The latter denied his liability, set up contributory negligence, and paid 75*l.* into court. The council denied liability, but they set up also a defence different from that of the contractor, for they said that he was an independent contractor, and that if he had been guilty of negligence the council were not liable. They added, further, a plea that the money paid into court by their co-defendant was enough to satisfy the claim of the plaintiff, but they paid no money into court. A verdict passed for the plaintiff for 50*l.*, so that the contractor got judgment in his favour, for he had paid more than sufficient into court, and my brother Bruce came to the conclusion that the defence of the council that Iles was an independent contractor was not a good defence, because, having control of the works, the council were liable for the negligent acts of their contractor. The position, then, is that the council are found to be liable as principals for the negligence of their agent. They have not paid anything into court in respect of their liability, and can have no defence to the action. That the plaintiff has got 50*l.* from Iles does not shew that there is no cause of action against the council, and the only effect of it is that the judgment against them must be for costs only, for the plaintiff cannot get damages twice over.

(1) [1894] A. C. 48. (2) [1896] 1 Q. B. 335.

C. A.
1899

PENNY
v.
WIMBLEDON
URBAN
COUNCIL.

A. L. Smith L.J.

There was another point—that the negligence complained of was casual or collateral, having regard to the nature of the employment, and that the council were therefore not liable. My brother Bruce laid down with great accuracy the law applicable in such a case. Dealing with the facts, he says, as will be found at page 217 of the report, that "the district council employed a contractor to do work upon the surface of a road which they knew was being used by the public, and they must have known that the works which were to be executed would cause some obstruction to the public, and some danger, unless means were taken to give due warning to the public." Higher up on the same page he had stated, with regard to *Pickard* v. *Smith* (1): "The principle of the decision, I think, is this, that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor." I agree with this entirely, but would add as an exception the case of mere casual or collateral acts of negligence, such as that given as an illustration during the argument—a workman employed on the work negligently leaving a pickaxe, or such like, in the road. I cannot hold that leaving heaps of soil in the road, which would by the very nature of the contract have to be dug up and dealt with, is an act either casual or collateral with reference to the contract.

I think the decision of the learned judge was quite right, and that the appeal should be dismissed.

VAUGHAN WILLIAMS L.J. I entirely agree. With regard to the practice point, it seems to me to be a fallacy to treat the plea set up by the council as if it were within Order XXII., r. 1, which permits a defendant with a defence denying liability to pay money into court. Under that rule there may be payment into court which involves admission of the cause of action, or

(1) 10 C. B. (N.S.) 470.

payment with a defence denying liability. Throughout the argument addressed to us on behalf of the council it was assumed that the defence was payment into court; but when that payment is made with a denial of liability the defence is that denial. The importance of this in the present case is that both defendants have put in defences denying liability; but one of them only with that defence chose to pay a sum of money into court. In doing so he did not set up the payment as a defence, but it was an offer of amends made for the sake of peace. The result is that, though he has been defeated as to the denial of liability, he is not placed in the position of a defeated defendant because of the provisions of rule 6 of the same order, the amount recovered being less than the amount paid in. Thus, notwithstanding his defeat on the question of liability, he is successful on the question of costs. He has improved his position, but I can see no reason for saying that his payment into court has improved the position of the other defendants. Looked at from that point of view, the cases cited as to satisfaction have no application. There never was, in relation to the district council, satisfaction of the cause of action against them at any time during the trial.

As to the question of the liability of the council for the acts of the contractor, there is hardly any subject on which the course of the authorities, down to the recent case of *Hardaker* v. *Idle District Council* (1), has been so uniform and clear. In cases like the present, where a statutory authority has power to do something to a road which involves stopping it, or to do something to it which will make it dangerous while it is being done, there is a duty cast upon them to take care that the Queen's subjects are not injured by any carelessness in the doing of that which has to be done. This is expressed in the judgment in *Pickard* v. *Smith* (2) thus: "If an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. The rule is, however, inapplicable to cases in which the act which occasions the injury is one which the employer is employed to do; nor,

(1) [1896] 1 Q. B. 335. (2) 10 C. B. (N.S.) 470.

C. A. 1899

PENNY v. WIMBLEDON URBAN COUNCIL.

Vaughan Williams L.J.

by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." This has been applied expressly and tersely in the present case by Bruce J. in the passage that has been already quoted. I entirely agree with his application of the principle to the facts of the present case, and his judgment should not be disturbed.

ROMER L.J. Having regard to the present state of the authorities, I think that the following is a correct statement of the law on the subject. When a person, through a contractor, does work which from its nature is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor if the latter does not take these precautions. I desire to point out that accidents arising from what is called casual or collateral negligence cannot be guarded against beforehand, and do not come within this rule. The work done in this case was the making up of a road frequented by the public. From the nature of this work danger was likely to arise to the public accustomed to use the highway by the alteration of level, and by the heaps of soil and the holes almost inevitable in work of the kind. The usual precaution to take in such a case is to put up lights or other warnings to prevent persons falling into the holes or over the heaps of soil. In my opinion, it is unreasonable not to take those precautions, and the passages from the contract that I have referred to in the course of the argument shew that this view is correct.

As to the other point, the case before us is not one in which the district council have adopted the defence of their co-defendant, and offered to treat the payment into court as made on their behalf, and agreed to abide by all the consequences that may arise from their co-defendant's pleading.

Appeal dismissed.

Solicitor for plaintiff: *S. A. Jones.*

Solicitor for district council: *W. H Whitfield.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1899
March 7;
May 15.

HORSEY ESTATE, LIMITED *v.* STEIGER AND THE PETRIFITE COMPANY, LIMITED.

Landlord and Tenant—Forfeiture—Proviso for Re-entry—Condition against Liquidation—Winding up of Company—Condition running with the Land—Covenant not to Assign or Underlet—Notice before Action for Forfeiture—Reasonable Notice—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 1, 6—*Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 2, *sub-s.* 2.

A lease of premises to an individual and a joint stock company contained a covenant by the "lessees" (which expression was by the terms of the lease to include assigns where the context so required or admitted) to keep the premises in repair, and a proviso for re-entry for breach of covenant, or if the lessees should become bankrupt, or enter into liquidation for the benefit of, or compound with their creditors, or, being a company, should enter into liquidation, whether compulsory or voluntary.

The reversion on the lease was conveyed to the plaintiffs and the lease was assigned by the lessees with the plaintiffs' consent to the defendants, an individual and a joint stock company. The defendant company subsequently passed a resolution for a voluntary winding-up, not by reason of insolvency, but for the purpose of reconstruction with additional capital. The plaintiffs served upon the defendants a notice alleging as grounds of forfeiture under the proviso the liquidation, and also breaches of the covenant to repair of an extensive character, and requiring the defendants to remedy and make compensation for the same. Two days after service of the notice and within a year from the passing of the resolution for winding-up, the plaintiffs commenced an action against the defendants for recovery of the premises as upon a forfeiture. It was admitted by the plaintiffs at the trial that they could not rely on any of the alleged breaches of the covenant to repair:—

Held, that the defendant company had entered into liquidation within the meaning of the condition contained in the lease; and,

Semble, that the condition ran with the land.

But *held*, also, that a sufficient notice under s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, was a condition precedent to enforcing the forfeiture, the effect of s. 2, sub-s. 2, of the Conveyancing and Law of Property Act, 1892, being to take the case of a forfeiture on bankruptcy or liquidation out of sub-s. 6 of s. 14 of the Conveyancing and Law of Property Act, 1881, for a year from the date of the bankruptcy or liquidation; and that the notice given was not sufficient, and therefore the action was not maintainable.

A lease contained a covenant by the lessees for themselves and their assigns

C. A.
1899
HORSEY ESTATE, LIMITED v. STEIGER.

not to assign or underlet the premises without the consent of the lessors, which was not to be unreasonably withheld. Assignees of the lease entered into an agreement for the sale thereof by which it was provided that at a certain period, though the purchase might not then be completed, the purchasers should be let into possession of the premises, and should from that date pay the rents and outgoings in respect of the same. The purchasers were let into possession under that agreement, the purchase remaining uncompleted :—

Held, that so letting them into possession was not a breach of the covenant against assignment or underletting without the consent of the lessors.

APPEAL from the judgment of Hawkins J. (1) in an action tried before him without a jury.

The action was to recover possession of premises under a proviso for re-entry contained in a lease.

On November 4, 1889, by deed bearing that date the trustees of the will of Thomas Horsey, deceased, demised to John Donelly and the Patent Stamped Steel Railway Axle Box Company, Limited, a piece of land at Blackwall for a term of twenty-one years from September 29, 1889, at the rent therein mentioned. By the lease the "lessees" (which expression was to include the executors, administrators, and assigns of the said John Donelly, and the successors and assigns of the said company where the context so required or admitted), for themselves and their assigns, and as a separate covenant each of them, for himself and itself respectively and his and its respective assigns, covenanted to pay the rent; to repair all buildings which thereafter might during the term be erected on the demised land; and not at any time or times during the term to assign or underlet the premises, or any part thereof, without first obtaining the consent of the lessors in writing, which consent was not to be unreasonably or vexatiously withheld in the case of the lessees satisfying the lessors that the proposed assignee or underlessee was a substantial, respectable, and responsible person. There was a proviso in the lease for re-entry if rent should be in arrear for twenty-one days, or the lessees should at any time fail or neglect to perform or observe any of their covenants, or "if the lessees shall become bankrupt or enter

(1) [1898] 2 Q. B. 259.

into liquidation for the benefit of or compound with their creditors, or, being a company, shall enter into liquidation, whether compulsory or voluntary."

On August 1, 1894, the lessors named in the lease conveyed all their interest in the premises to the plaintiffs. On March 31, 1896, the lessees, with the consent of the plaintiffs, assigned the residue of the term to the defendants, Jacob Steiger and the Petrifite Company, Limited. The consent of the plaintiffs was expressly limited to the particular assignment. On December 28, 1896, the defendant company duly passed under s. 129 of the Companies Act, 1862, a resolution for a voluntary winding-up of the company, which was duly confirmed at a meeting held on January 26, 1897, on which day a liquidator was duly appointed to carry out the resolution. This liquidation was not on account of any pecuniary embarrassment of the company, but simply for the purpose of reconstructing the company and increasing its capital. In furtherance of this object a new company was, on September 27, 1897, duly formed and registered by the same name. On October 29, 1897, under the provisions of s. 14 of the Conveyancing Act, 1881, a notice was served by the plaintiffs upon the original lessees and the defendant Steiger preparatory to taking proceedings to enforce the right of re-entry. On November 2 a similar notice was served on the defendant company. The notice stated as grounds of forfeiture that the defendant company had entered into liquidation and also breaches of the covenant to repair, and set forth in a schedule particulars of the latter breaches. It further required the defendants to remedy the breaches specified therein (which involved very extensive repairs) and to make compensation in money for them, and stated that, if the defendants failed to remedy the breaches or any of them and to make compensation within a reasonable time, the plaintiffs would re-enter upon the premises. On November 4 the action was brought. On December 2, 1897, an agreement was entered into between the defendant company, the defendant Steiger, and the new company by which it was agreed that the defendant company, with the approval of the defendant Steiger, should sell, and the new company should

C. A. 1899

HORSEY ESTATE, LIMITED v. STEIGER.

purchase (inter alia) all the right and interest of the defendants in the premises for the residue of the term, and that the defendant company would assign, and procure the concurrence of all other necessary parties in assigning, to the new company (inter alia) all the interest of the defendants therein. The agreement contained a stipulation that, though the purchase might not then be completed, the new company should be let into possession of the premises within seven days of the first allotment of shares in the new company, and as from that date should be deemed to have taken over the same, and should as from that date pay all rents, rates, taxes, and outgoings, but that in the event of a rescission of that agreement (which had not happened) possession of the premises should be redelivered to the defendants. Under this agreement the new company was let into and still remained in possession of the premises, but nothing more had been done towards the completion of the sale of the lease, and no assignment had been made of the term, nor had any application been made to the plaintiffs for their assent to such an assignment. To avoid the expense of a fresh action the parties agreed at the trial that, if what had taken place under the agreement of December 2, 1897, amounted to a ground of forfeiture, as being a breach of the covenant against assignment or underletting of the premises without the consent of the plaintiffs, it should be treated as having occurred before action. At the trial the plaintiffs' counsel admitted that they could not rely on any of the alleged breaches of the covenant to repair, which they therefore abandoned. The learned judge gave judgment for the plaintiffs on the ground that the defendant company had entered into liquidation within the meaning of the proviso for re-entry contained in the lease.

March 7. *Herbert Reed, Q.C.* (*Clarke Williams* with him), and *Hammond Chambers, Q.C.* (*Boome* and *Timins* with him), for the respective defendants. Upon the true construction of the lease, the liquidation contemplated by the condition or proviso for re-entry is a liquidation in consequence of insolvency, and here the liquidation was not of that character.

Furthermore, in order to afford a ground of forfeiture under that part of the proviso, both the individual lessee must be bankrupt or have liquidated with his creditors and the company must also have entered into liquidation.

The condition with regard to liquidation does not run with the land, so that liquidation by the defendant company, who were not original lessees, but only assignees of the lease, was not a ground of forfeiture. A covenant will not run with the land unless it touches or concerns the thing demised, and the same principle applies to a condition: see *Stevens* v. *Copp* (1), and the authorities there referred to. A condition against liquidation by a company does not touch the thing demised as a condition against bankruptcy does; for in such a liquidation there is no assignment of the demised premises by operation of law to the liquidator as there is in bankruptcy to the trustee: *In re Oriental Bank.* (2)

A notice under the Conveyancing Act, 1881, s. 14, sub-s. 1, was a condition precedent to the right of re-entry. Assuming that the liquidation stands on the same footing as bankruptcy under the Conveyancing Act, 1881, s. 14, sub-s. 6, by virtue of the definition contained in s. 2 (xv.), then this case comes within s. 2, sub-s. 2, of the Conveyancing Act, 1892, and therefore s. 14, sub-s. 1, of the Act of 1881 applies, and notice was necessary. But it is submitted that liquidation of a company is not equivalent to bankruptcy for the purposes of sub-s. 6 of s. 14 of the Act of 1881: *In re Oriental Bank.* (2) The notice in this case was insufficient. It was only served upon the defendant company two days before action brought, and it is clear that such a notice, in order to be good, must give a reasonable time to the tenant before the action is brought. The notice alleged, as ground of forfeiture, in addition to the liquidation by the defendant company, extensive breaches of the covenant to repair. It is now admitted that the plaintiffs cannot rely on any breach of that covenant; and the notice did not give a reasonable time for doing the specified repairs even if the defendants were bound to do them. If a notice contains requisitions which the tenant cannot be required to

(1) (1868) L. R. 4 Ex. 20. (2) (1884) 28 Ch. D. 634, at p. 640.

C. A. 1899

HORSEY ESTATE, LIMITED v. STEIGER.

comply with it is bad altogether: *In re Serle* (1); *Fletcher* v. *Nokes*. (2)

There was no breach of the covenant not to assign or underlet the premises. The letting into possession of the new company under the agreement for sale of the lease does not amount either to an assignment or to an underletting. It cannot be contended that the new company were tenants at will, because it is essential to a tenancy at will that there should be power to determine the will, and here the vendors could not do so, because under the agreement for sale the new company had a right to possession. The new company were not tenants to the defendant company. They were purchasers from them. The defendant company could not have sued them for use and occupation. The covenant here is only a covenant against assignment or underletting, and not a covenant against letting any one into possession without the consent of the landlord. The latter covenant is frequently inserted in leases, but, if the contention for the plaintiffs is correct, it would never be necessary.

[They cited on this point *West* v. *Dobb*. (3)]

Christopher James (*B. A. Cohen* with him), for the plaintiffs. The defendant company entered into liquidation within the meaning of the condition. There are no words in the condition importing any such qualification of the term "liquidation" as the argument for the defendants requires, and the Court has no power to read in such words.

Having regard to the object of the condition, the true construction of it is that a right of forfeiture arose if one of the lessees became bankrupt or compounded with his creditors or the other entered into liquidation. The lessees could not both of them be bankrupt or be wound up, one being an individual and the other a company. The condition must therefore be read with regard to them severally. One object of such a condition is to prevent the landlord from having a tenant imposed upon him against his will.

The condition with regard to liquidation runs with the land

(1) [1898] 1 Ch. 652.
(2) [1897] 1 Ch. 271.
(3) (1869) L. R. 4 Q. B. 634; (1870) L. R. 5 Q. B. 460.

as being one which touches or concerns the thing demised. A condition for the determination of a lease necessarily touches or concerns the thing demised inasmuch as it has relation to the period of its enjoyment: *Roe* v. *Hayley*. (1) It is submitted that since the Conveyancing Act, 1881, such a condition must run with the land. Sub-sect. 1 of s. 10 of the Conveyancing Act, 1881, implies that all such conditions touch or concern the thing demised, for it provides that the benefit of covenants in a lease by the lessee shall go with the reversion only if they have "reference to the subject-matter thereof," but that all conditions without distinction shall go with the reversion. If a condition does not run with the land, the anomalous result is produced that the assignee of a lease has a larger estate than the lessee. In *Stevens* v. *Copp* (2) the question was whether the condition ran with the reversion, it being the assignee of the reversion who was seeking to avail himself of the condition which in that case was of a collateral nature. If necessary the plaintiffs contend that the decision in that case was wrong. Assuming that a condition for re-entry does not necessarily and in all cases touch or concern the thing demised so as to run with the land, it is submitted that a condition for re-entry in the event of liquidation like this does so. It is in pari materiâ with a condition for re-entry in the event of bankruptcy of the lessee, and it has been held that such a condition runs with the land, being analogous to a condition against assignment of the lease, because the effect of bankruptcy is to work an assignment by operation of law: *Roe* v. *Galliers* (3); *Doe* v. *Ingleby* (4); *Smith* v. *Gronow* (5); *Doe* v. *David* (6); *Vyvyan* v. *Arthur* (7); *Vernon* v. *Smith*. (8) Liquidation does not in point of form involve an assignment of the lease as bankruptcy does, but it substantially produces the same effect. The company ceases to exist except for the purposes of the winding-up. The liquidator alone can deal with the premises, and the object of liquidation like that of bankruptcy is the distribution of the property.

(1) (1810) 12 East, 464.
(2) L. R. 4 Ex. 20.
(3) (1787) 2 T. R. 133.
(4) (1846) 15 M. & W. 465.
(5) [1891] 2 Q. B. 394.
(6) (1834) 1 C. M. & R. 405.
(7) (1823) 1 B. & C. 410.
(8) (1821) 5 B. & A. 1.

C. A.
1899

HORSEY ESTATE, LIMITED v. STEIGER.

As the law stood under s. 14 of the Conveyancing Act, 1881, no notice would be necessary in respect of such a forfeiture as this, for by sub-s. 6 of that section its provisions do not extend to a condition for forfeiture on the bankruptcy of the lessee, and by s. 2 (xv.) "bankruptcy" includes liquidation by arrangement, and any other act or proceeding in law, having, under any Act for the time being in force, effects or results similar to those of bankruptcy. By the Conveyancing Act, 1892, s. 2, sub-s. 2, "sub-s. 6 of s. 14 of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee . . . . only after the expiration of one year from the date of the bankruptcy . . . . and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-s. 6 shall cease to be applicable thereto." It is submitted that the words "and provided," &c., form a condition subsequent upon which the applicability of the sub-section depends, and that, where the lessee's interest is not sold within the year, the sub-section does not take effect; and therefore in that case sub-s. 6 of s. 14 of the Act of 1881 applies, and no notice is necessary as a condition precedent to the right of forfeiture for breach of a condition against liquidation. Here the lessees' interest was not sold within the year, for, though there was an agreement for sale of it, the sale had not been completed; and the sale contemplated by the Act must be a completed sale so as to put the landlord in the position of having a tenant within the year.

If notice under s. 14, sub-s. 1, was necessary, the notice given was sufficient. The question whether a notice is a sufficient notice within s. 14 of the Conveyancing Act, 1881, as being reasonable must depend on the circumstances of the particular case. If the breach of covenant or condition is one which can be remedied or made the subject of pecuniary compensation, no doubt a reasonable time must be allowed for remedying it and making compensation; but the breach of condition in this case was not one which could be remedied or made the subject of compensation, and therefore the notice was sufficient.

There was a breach of the covenant against underletting. A purchaser in possession before completing is at law a tenant: per Parke B. in *Doe* v. *Stanion*. (1) The new company were in the position of being in equity assignees of the term and at common law tenants at will. The defendants cannot argue that they are not tenants at will on the ground that in equity they are entitled as assignees; for that would be blowing hot and cold. An assignment would be a breach of the covenant, and they cannot say for one purpose that there was an assignment, and for another that there was not. [He cited on this point *Roe* v. *Sales* (2); *Doe* v. *Jackson*. (3)]

H. Reed, Q.C., and *Clarke Williams*, in reply.

Cur. adv. vult.

May 16. LORD RUSSELL of KILLOWEN C.J. read the following judgment, with which A. L. SMITH L.J. and COLLINS L.J. concurred:—The question is whether the plaintiff company has established the right to re-enter upon the demised premises upon either of the grounds of forfeiture alleged, namely, (*a*) that the defendant company has entered into liquidation; or (*b*) that the defendants have underlet the demised premises. First, as to the liquidation—That the defendant company has entered into liquidation is not denied, but it was argued for the defendants (1.) that upon the true construction of the lease, the liquidation, within the meaning of the condition or proviso in the lease, must be a liquidation brought about by, or in consequence of, insolvency, which (it was admitted) was not the case here; (2.) that the proviso in the lease only applied in case the individual lessee was bankrupt or had liquidated with his creditors *and* the company had entered into liquidation in consequence of insolvency; (3.) that, if these contentions failed, the proviso or condition in question did not run with the land so as to bind the defendants, who were assigns merely of the original lessees; (4.) that due notice under the Conveyancing Act of 1881, s. 14, had not been given before

(1) (1836) 1 M. & W. 695. (2) (1813) 1 M. & S. 297.
(3) (1823) 1 B. & C. 448.

C. A. 1899

HORSEY ESTATE, LIMITED v. STEIGER.

Lord Russell C.J.

action, and that this was a condition precedent to the right to maintain any action; and, lastly (5.), that the defendants were, all these contentions failing, entitled to apply to the Court for relief. I propose to consider these points seriatim.

As to the first point, in my judgment the determining event is the entering into liquidation in fact, and the cause which led to that event, or its object, is wholly immaterial. The contention of the defendants involves the introduction into the proviso after the word "voluntary" of the words "in consequence of insolvency." It seems to me the condition or proviso must be construed according to its plain meaning and without this qualification.

As to the second point, I think that the condition is carefully framed so as to make the proviso for re-entry apply, if either the individual lessee became bankrupt or compounded with his creditors (which is the first clause of the condition), *or* if the company lessee entered into liquidation. If therefore this were an action against the original lessees, the plaintiff company would, subject to the question of notice, be entitled to re-enter under the condition. But this is an action against the assigns of the original lessees.

The third point, which presents the greatest difficulty, has therefore to be considered—namely, is this condition of re-entry in the event of the company entering into liquidation one which, in the language of the common law, "runs with the land"? It is to be noted that this question was not raised in the Court below, and the judgment of the learned judge is silent upon it. It was put in argument that the question here turned upon a condition and not upon a covenant, and it was suggested that the cases dealing with covenants were therefore not authorities on the present question. I cannot assent to this view. Whether a particular covenant or condition does or does not run with the land is determined by the common law, and it is enough to say that the authorities uniformly treat them as governed by the same principles: *Stevens* v. *Copp*. (1) Further, the statute 32 Hen. 8, c. 34, s. 1, which

(1) L. R. 4 Ex. 20.

gives assignees of the reversion the same benefit and remedies as lessors or grantors in respect of covenants and conditions, couples them together, and s. 2 of that Act, which gives lessees the same remedies against assignees of the reversion which they had against the lessor or grantor, in like manner couples conditions and covenants together. Is, then, the condition in question one the burden of which runs with the land so that its obligation binds the assignee of the lease? The answer to this question depends, in this case, upon whether it is a condition touching the thing demised or is merely collateral. I say "in this case" because there are undoubtedly collateral covenants or conditions, which on equitable principles, but only in a restrictive sense, bind the assignee. But this principle is confined to covenants and conditions of a negative character, and depends upon notice. But apart from cases of this class the true principle is that no covenant or condition which affects merely the person, and which does not affect the nature, quality, or value of the thing demised or the mode of using or enjoying the thing demised, runs with the land: see *Mayor of Congleton* v. *Pattison*. (1) Does, then, the condition or proviso in question "run with the land"? On the whole, and after much hesitation, I have arrived at the conclusion that it does. It must be taken as fully established that a covenant against assignment and also a proviso for re-entry in the case of bankruptcy run with the land: see *Roe* v. *Sales* (2); *Doe* v. *David* (3); *Doe* v. *Ingleby* (4); *Williams* v. *Earle* (5); *Varley* v. *Coppard* (6); *Smith* v. *Gronow*. (7) I think that a proviso for re-entry in case of liquidation by a company or an individual falls within the principle of these cases, and indeed that the proviso as to liquidation is cognate both to a covenant against assignment and to a proviso relating to bankruptcy. It partakes of the character of each of them. The proviso against bankruptcy was introduced into leases in consequence of the ordinary covenant against assignment

(1) (1808) 10 East, 130.
(2) 1 M. & S. 297.
(3) 1 C. M. & R. 405.
(4) 15 M. & W. 465.
(5) (1868) L. R. 3 Q. B. 739.
(6) (1872) L. R. 7 C. P. 505.
(7) [1891] 2 Q. B. 394.

C. A. 1899

HORSEY ESTATE, LIMITED v. STEIGER.

Lord Russell C.J.

being held not to apply to the involuntary assignment which is the consequence of bankruptcy: see *Doe* v. *Ingleby* (1); and, like the covenant against assignment, it touches the question who shall have and occupy the premises demised, and therefore touches and concerns the thing demised: see *Williams* v. *Earle* (2), per Blackburn J. I find myself unable to draw any distinction in principle between these cases and the case of a proviso for re-entry in case the assign of the lessee should enter into liquidation. I think the result, that covenants against assignment and provisoes for re-entry in the event of bankruptcy or liquidation stand on the same footing, is made clearer by considering what are the consequences following from a company entering into liquidation. By s. 129 of the Companies Act, 1862, the company may be wound up, as in this case, by a special resolution, and by s. 130 the winding-up is deemed to commence when the resolution is passed. By s. 131, the special resolution having been passed, the company ceases to carry on its business except as far as may be required for its beneficial winding-up; it is moribund, if not dead. By s. 133 its property, after payment of creditors, must be distributed amongst its members, and by sub-s. 7 of s. 133 the liquidator may, without its being necessary to obtain any sanction from the Court, exercise all the powers of the official liquidator; and amongst these powers is that given by s. 95, enabling the liquidator to sell the real or other property to any person or company, or to sell the same in parcels. In the present case, the original and confirmatory resolutions for winding-up having been passed, it cannot be contested that liquidation has in fact been entered upon, and, although it is true that the winding-up has not been completed within the meaning of ss. 142 and 143, I see no power in the company to undo what it has done. The winding-up must go through, and must involve the dealing with the property of the company, including their interest in the premises in question, in the manner provided in the foregoing sections. I arrive, therefore, at the conclusion that the proviso for re-entry in case of the assigns of the original lessees entering upon liquidation applies,

(1) 15 M. & W. 465, at p. 470. (2) L. R. 3 Q. B. 739, at p. 749.

and that unless there is some other answer the plaintiffs can insist on re-entering.

I have now to consider the remaining, the fourth, point—namely, that no proper notice was given under s. 14 of the Conveyancing Act, 1881. Was any such notice necessary? The answer to that question depends upon two considerations: —(1.) Is the liquidation in this case equivalent to a bankruptcy within sub-s. 6 of s. 14? And if so, (2.) What is the effect of sub-s. 2 of s. 2 of the amending Act of 1892? As to the first, I think, looking to the wide words of the interpretation section (2.) of the Act of 1881 referring to bankruptcy, that liquidation is within the meaning of bankruptcy as interpreted by sub-s. 6 of s. 14 of the Act of 1881. It follows that, if the Act of 1892 has not effected a difference, the plaintiff company was not bound, as to this ground of forfeiture, to give notice at all. Has, then, the Act of 1892 made any difference? I think it has. I think the effect of s. 2, sub-s. 2, of that Act, which is very difficult of construction, is to take the case of forfeiture for bankruptcy or liquidation out of the cases in which notice is not necessary for one year from the bankruptcy or liquidation. If, then, notice is necessary, has it been given? To determine the character of the required notice, what it shall contain and when it ought to be given, it is necessary to consider the scope of s. 14 of the Act of 1881 as a whole. The object seems to be to require in the defined cases (1.) that a notice shall precede any proceeding to enforce a forfeiture, (2.) that the notice shall be such as to give the tenant precise information of what is alleged against him and what is demanded from him, and (3.) that a reasonable time shall after notice be allowed the tenant to act before an action is brought. The reason is clear: he ought to have the opportunity of considering whether he can admit the breach alleged; whether it is capable of remedy; whether he ought to offer any, and, if so, what, compensation; and, finally, if the case is one for relief, whether he ought or ought not promptly to apply for such relief. In short, the notice is intended to give to the person whose interest it is sought to forfeit the opportunity of considering his position before an action is brought against

C. A. 1899

HORSEY ESTATE, LIMITED v. STEIGER.

Lord Russell C.J.

him. The notice in question is dated October 29, 1897, and alleges that the defendants, the company, had entered into liquidation, and, further, that they had broken the covenant to repair. It then proceeds to demand compensation and gives notice that if the defendants fail to remedy the breaches within a reasonable time the plaintiffs will re-enter. To the notice is annexed a schedule requiring very extensive repairs to be done, which would require a considerable time to accomplish. This notice was served on November 2, and the writ in the action was served on November 4. It is now admitted that the plaintiffs were not in a position to rely upon the alleged breach for non-repair. In these circumstances, can this be said to be a proper notice within the Act? On the whole, I think not. In the first place, if the entering upon liquidation had alone been put forward, the defendants would have had the opportunity of considering whether they had any answer, and, if not, whether they could make terms with the plaintiffs, but this was impracticable so long as the claim for breach of covenant to repair was made. Again, if non-repair was alone relied on, the defendants might possibly by offer of compensation accompanied by undertaking to repair have made terms with the plaintiffs. Further, the statute clearly contemplates that a reasonable interval shall elapse after service of notice and before action. Can two days' notice be said, in all the circumstances, to be a reasonable notice? I think not. On the whole, therefore, I am of opinion that the notice was bad and did not comply with the condition precedent to action within s. 14 of the Act of 1881.

Finally, as to the alleged breach by underletting. It is admitted that there has been no assignment within the meaning of the covenant against assignment. What has taken place is this. The defendants, having agreed to sell to the new company, have let them into possession pending the completion of the purchase, the new company undertaking to pay all rents, rates, and outgoings in connection with the premises or the business there carried on. There is a provision for redelivery of possession to the defendants if the contract should be rescinded. It is contended that this makes

the new company the defendants' undertenants. But on what terms? The new company pay no rent to the defendants; they have undertaken no obligations to the defendants except those mentioned, which are not necessarily obligations of tenancy. But it is said the proper implication from these facts is that a tenancy at will has been created. Whether this may be technically so or not, the practical answer to this contention seems to be that the defendants could not by the exercise of their will turn the new company out. The effective answer of the new company would be, "We have come in as purchasers and we are willing to carry out our terms of purchase." In plain sense and according to the ordinary understanding of men, this is not a case of underletting at all, but merely a case in which the new company has been let in on terms of purchase. Had the covenant been (as is of late years often the case) against parting with possession without licence of the landlord, the plaintiff company would have proved a breach of such a covenant, but they have not established a breach of the covenant in question, which is against underletting only. My learned brethren agree with this judgment. The appeal will therefore be allowed with costs.

Appeal allowed.

Solicitors for plaintiffs: *Druces & Attlee.*
Solicitor for defendant Steiger: *T. Durant.*
Solicitor for defendants, the Petrifite Company: *P. Warner.*

E. L.

1899
May 15.

CAMERON, APPELLANT *v.* TYLER, RESPONDENT.

Weights and Measures—Sale of Coal—Delivery of Ticket—Insertion of Seller's Name—Name under which Seller trades—Weights and Measures Act, 1889 (52 *&* 53 *Vict. c.* 21), *s.* 21, *Sched. III.*

The appellant was convicted for default in compliance with the provisions of the Weights and Measures Act, 1889, s. 21, with respect to the delivery of a ticket with a ton of coal delivered by him, by means of a vehicle, to a purchaser. He had delivered a ticket in the form in the third schedule to the Act; in the place for the name of the seller were inserted the words, "Sellers the Co-operative Coal Company." This was the name under which the appellant traded, but there was no real company. There was no intent to defraud.

On a case stated for the opinion of the Court :—

Held, that the provision in the Act, requiring the insertion in the ticket of the seller's name, was sufficiently complied with by the insertion of the name under which the appellant carried on his business, and the conviction was wrong.

CASE stated by justices for the county of Middlesex sitting at Brentford.

The appellant was summoned, by a summons directed to Frederick Brough Cameron trading as the Co-operative Coal Company, for default in complying with the requirements of the Weights and Measures Act, 1889, s. 21 (1), with respect to the delivery of a ticket.

At the hearing the following facts were proved.

On November 18, 1898, one of the appellant's carmen delivered to a purchaser at Old Brentford coal exceeding two hundredweight, to wit one ton, by means of a vehicle on which the appellant's name, "Cameron," appeared.

(1) By the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 21, sub-s. 1, "Where any quantity of coal exceeding two hundredweight is delivered by means of any vehicle to a purchaser, the seller of the coal shall therewith deliver, or cause to be delivered, or to be sent by post or otherwise, to the purchaser or to his servant, before any part of the coal is unloaded, a ticket or note according to the form in the third schedule to this Act, or according to a form to the like effect."

Sub-s. 2 imposes a penalty for default in complying with the requirements of the section with respect to (inter alia) the delivery of a ticket.

The third schedule gives a form of weight ticket, or consignment note, which, after specifying the weight of the coal delivered, contains the following direction,

"[*Here insert the name of the seller*]."

Before any of the coal was unloaded the carman delivered to the purchaser a ticket, partly in writing and partly in print, wherein the seller of the coal was described as "the Co-operative Coal Company." Before the ticket was delivered the name of the person in charge of the vehicle had been inserted therein.

The appellant had for several years carried on business as a coal merchant, on his own account, at 107, Pancras Road, and at 215, Uxbridge Road, Ealing Dean, and at other places, under the name of "the Co-operative Coal Company," and under four other different names in London. There was, however, no company, limited or otherwise, in existence.

The purchaser had ordered the ton of coal from an office, where the appellant was trading under the name of "the Co-operative Coal Company," at Ealing Dean.

It was contended by the respondent that the words in the ticket, "Sellers the Co-operative Coal Company," were not a compliance with s. 21 and Sched. III. of the Weights and Measures Act, 1889, and that the real name of the seller, "Frederick Brough Cameron," ought to have appeared in the ticket.

It was not contended that there was any intention or attempt to deceive or defraud the purchaser.

The justices thought that the real name, "Frederick Brough Cameron," ought to have appeared on the ticket, and not "the Co-operative Coal Company," under which name he was carrying on business, as it was not a sufficient disclosure of the name of the seller, and that the words, "Sellers the Co-operative Coal Company," were not a sufficient compliance with the Act of Parliament, there being in fact no such company, and they convicted the appellant.

L. W. Kershaw, for the appellant. The conviction was wrong. The insertion in the ticket of the name under which the appellant carries on his business satisfies the requirements of the statute, and conveys fuller information to the purchaser than would be conveyed by the insertion of the appellant's own name.

[He was stopped.]

1899

CAMERON v. TYLER.

J. C. Earle, for the respondent. The words "the name of the seller" in the form in the third schedule to the Act mean the seller's real name. The object of the statute is the protection of the purchaser: *Cundell* v. *Dawson* (1), decided on an Act containing a similar provision. For the protection of the purchaser the true name of the seller should be given; otherwise difficulties might arise as to summoning the seller. In the present case there is no suggestion or suspicion of fraud or unfair dealing, but the statute must be intended to extend to cases where fraud and unfair dealing exist.

DARLING J. I am of opinion that the conviction in this case ought to be quashed. The Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), by the combined operation of s. 21 and the third schedule, directs that the name of the seller shall be inserted in the ticket which is to be delivered to the purchaser. This direction is complied with when the seller puts on the ticket the name under which he carries on his business. It is true in the present case that, if the appellant had put the name of Cameron on the ticket, that would have been the name of the seller within the meaning of the Act, for the appellant was Cameron, and Cameron did sell the coal to the purchaser; but it is equally true that the appellant was the Co-operative Coal Company, and the Co-operative Coal Company did sell the coal, so that either name would satisfy the requirements of the statute.

CHANNELL J. I am of the same opinion. The general law of this country is that a man may use any name he chooses to carry on his business, and there is nothing in the provisions of the Weights and Measures Act to alter this right. The conviction therefore cannot be supported.

Conviction quashed.

Solicitors for appellant: *Woodbridge & Sons.*
Solicitor for respondent: *Sir Richard Nicholson.*

(1) (1847) 4 C. B. 376; 17 L. J. (C.P.) 311.

P. B. H.

In re HARRIS.
Ex parte HASLUCK.

1899
April 24.

Bankruptcy—Practice—Release of Trustee—Error in Administration—Revocation by Board of Trade—"Suppression or Concealment of any Material Fact"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 82.

Sect. 82, sub-s. 3, of the Bankruptcy Act, 1883, enacts that an order of the Board of Trade releasing a trustee in bankruptcy shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the bankrupt, or otherwise in relation to his conduct as trustee, "but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact."

In January, 1898, a trustee in bankruptcy disallowed a proof in the mistaken belief that it was not a provable debt, and by an oversight notice of rejection was not sent to the creditor. In February, 1898, the trustee applied under s. 82, sub-s. 1, of the Act to the Board of Trade for his release. In March, 1898, he paid a dividend, and in the list of proofs transmitted to the Board of Trade marked the proof as "disallowed." In April and May, 1898, he received letters written on behalf of the creditor asking in effect when the claim would be settled, but in the bonâ fide belief that the proof had been properly dealt with and disallowed he did not answer the letters nor inform the Board of Trade that he had received them. In June, 1898, the trustee obtained his release under s. 82, sub-s. 2. In July the creditor communicated with the Board of Trade, who thereupon applied to the trustee for an explanation. Some correspondence ensued, and in January, 1899, the Board of Trade revoked the order of release on the ground that it had been obtained by the suppression or concealment of material facts. The trustee appealed:—

Held, (1.) that the words "suppression or concealment of any material fact" must be read to mean such suppression or concealment as has in it an element of fraud; (2.) that on the evidence the trustee had not wilfully withheld information from the Board of Trade, and that under the circumstances the order of the Board revoking his release must be discharged, but without costs.

Motion by the trustee in bankruptcy by way of appeal from the order of the Board of Trade revoking the order granting him his release.

In June, 1896, a receiving order was made against the debtor, adjudication followed, and Mr. Hasluck was duly appointed the

1899

HARRIS, *In re.* HASLUCK, *Ex parte.*

trustee in the bankruptcy. He proceeded to realize and get in the bankrupt's estate, and paid thereout 300*l.* in preferential claims and 1700*l.* in dividends to creditors.

Among the proofs lodged by creditors in July, 1896, was one by Mr. Hewitt, a collector of taxes, for 26*l.* 17*s.* 4*d.*, being arrears of income-tax under Scheds. A and D outstanding against the estate of the bankrupt for the year 1895–96, the payment of which was claimed as a preferential debt.

In December, 1896, Mr. Hasluck declared and paid a dividend of 4*s.* in the pound, and in the list of proofs then transmitted by him to the Board of Trade Mr. Hewitt's claim was marked as "standing over."

In January, 1898, Mr. Hasluck dealt with Mr. Hewitt's proof, and, acting under the bonâ fide belief that it was not payable out of the debtor's estate, he disallowed it; but by an oversight no notice of rejection was sent to Mr. Hewitt or to the Inland Revenue.

In February, 1898, Mr. Hasluck applied to the Board of Trade under s. 82 of the Bankruptcy Act, 1883, for his release, and sent the usual notice of his application to all the creditors, including (as he alleged) Mr. Hewitt, but no notice was received by Mr. Hewitt or by the Inland Revenue.

In March, 1898, Mr. Hasluck declared and paid a second and final dividend of 6*d.* in the pound, and in the list of creditors on this occasion transmitted to the Board of Trade Mr. Hewitt's proof was marked as "disallowed."

In April, 1898, Mr. Hasluck received a letter from Mr. Hewitt with reference to his proof, and on June 3 and 15 he received letters on the same subject from the Inland Revenue asking when the claim would be settled. He did not reply to any of these letters nor inform the Board of Trade that he had received them, and on June 28 the Board granted him the usual order of release.

In July the Inland Revenue communicated with the Board of Trade, and in September the latter wrote to Mr. Hasluck and requested him to furnish his explanation of the matter. In reply Mr. Hasluck stood on his strict rights under s. 82 of the Bankruptcy Act, 1883, and declined to enter into the

1899

HARRIS, *In re.* HASLUCK, *Ex parte.*

merits of the case. After some further correspondence the Board of Trade on January 23, 1899, revoked Mr. Hasluck's order of release on the ground that he had obtained the same by the suppression or concealment of the following material facts, namely, (1.) that although it appeared from the list of proofs forwarded by Mr. Hasluck to the Board of Trade that Mr. Hewitt's proof had been disallowed, the proof itself was not marked as having been disallowed or rejected; (2.) that no notice of rejection was received either by Mr. Hewitt or the Inland Revenue; (3.) that no notice of Mr. Hasluck's intention to apply for his release was received by Mr. Hewitt or the Inland Revenue; (4.) and that prior to the granting of the release Mr. Hasluck had received the letters of June 3 and 15 from the Inland Revenue to which he had not replied. Mr. Hasluck appealed against the order revoking his release. Mr. Hasluck was examined, and in the course of his evidence stated that the reason why he did not answer the letters in question was that he thought the proof had been properly dealt with and disallowed. He thought notice of rejection had been given, and, as there had been no appeal, he did not consider it necessary to reopen the subject. Creditors frequently wrote such letters after their proofs had been dealt with, and his practice was not to answer them. That was the reason why he did not inform the Board of Trade.

Reed, *Q.C.*, and *Rolland*, for Mr. Hasluck. If this order of revocation stands, the trustee will be personally liable to pay this 26*l.* 17*s.* 4*d.*; but the Board can only revoke the order of release on the grounds stated in s. 82 of the Act. There must be fraud, or *wilful* suppression, or concealment of some material fact. Nothing of the kind exists here. The grounds of revocation stated by the Board are insufficient, and the trustee resents the imputation cast upon his conduct. The Bankruptcy Rules do not require a proof to be marked as rejected before an appeal. The error here was not giving notice of rejection to the creditor. That was a slip in administration, and is just such an error or default as is intended by s. 82 to be covered by the order of release.

1899

HARRIS, *In re.* HASLUCK, *Ex parte.*

That was the old practice: *Ex parte Carter* (1); *Ex parte Barnard.* (2)

The Solicitor-General (*Sir R. B. Finlay, Q.C.*), and *Muir Mackenzie*, for the Board of Trade. This was a grave error in administration, and the order of revocation was properly made. The material point is that, while the trustee's application for his release was under the consideration of the Board, this correspondence was going on with the Inland Revenue, by which the payment of these taxes was being demanded, and he never brought the letters to the notice of the Board. If the Board had known, they would not have granted the order of release until the matter had been cleared up. He obtained his release by ignoring the letters, and when his attention was called to the facts he, in effect, declined to give an explanation. Of course, errors of administration are covered by the release, but the release must not be obtained by omitting to tell the Board of errors that have occurred. It was his plain duty either to have answered these letters, especially when his release was pending, or to have informed the Board of them.

Reed, Q.C., in reply.

WRIGHT J. This case is one of some importance, beyond its importance to this particular trustee, because it involves to some extent a construction of the 82nd section of the Bankruptcy Act, 1883, which enacts that the order of release may be revoked on proof that it was obtained "by fraud or by the suppression or concealment of any material fact." I think those words ought to be construed as meaning fraud, or such suppression or concealment as has in it some element of fraud. I think it would be a wrong construction to say that the Board of Trade may revoke the release simply because some material fact has actually been concealed, if there were no element of wrongfulness in the circumstances of the concealment; and what I have to inquire into here is, whether the concealment or suppression was one of a blameworthy kind, if I may use that expression. Now, undoubtedly the letters of June 3 and 15 raise a strong primâ facie case that Mr. Hasluck, at the very

(1) (1878) 8 Ch. D. 731. (2) (1882) 46 L. T. (N.S.) 24.

time when his application for a release was pending, had it called to his attention in a pointed way that there was a claim by the Inland Revenue as a creditor, which ought to have been brought to the attention of the Board of Trade when they were considering his application for release. What I have to determine is whether Mr. Hasluck's explanation of his omission to mention those circumstances to the Board of Trade is satisfactory. Now, his answer is, first, that he had in fact disallowed the proof of the Inland Revenue. That, I think, is true. Then he says that he took no further notice of the applications made on June 3 and 15 because he supposed that notice of rejection had been given; and if it is true that he did suppose that, I think that would be a sufficient answer in one sense, because, if notice of rejection had been duly given and there had been no appeal against the rejection, he would have been entitled to disregard renewed claims which would have no foundation in point of law; and although it may not be a right way of doing business, still he would be in a position to disregard the renewed claim of the Inland Revenue. It is very difficult, no doubt, to understand why a notice of each application for the release was sent to the Inland Revenue, if it were merely supposed that notice of rejection of their proof had been duly given them; but I think that, strange as that may appear, it is explained in this case by reason of this—that some clerk seems to have sent round wholesale to all the creditors who had proved, instead of to those only whose proofs had been admitted, notice of the application for release, and therefore no argument, as it seems to me, can be founded on the fact that such a notice was sent. Then I have to consider as well as I can whether that was the real state of Mr. Hasluck's mind—that is, whether he supposed notice of rejection had been given, and therefore the Inland Revenue were not in any sense creditors. After having heard his explanation, I have come to the conclusion that I ought to accept that view. I do not think that it is a proper inference in this case that there was any intention to gain any wrongful advantage in the prosecution of his application for a release by withholding information as to the claim of the Inland Revenue. I think it

1899

HARRIS, *In re.* HASLUCK, *Ex parte.*

Wright J.

is quite possible—indeed, I think I ought to hold it is very probably the fact—that Mr. Hasluck did suppose that these applications of the Inland Revenue were wiped out, that they had been disposed of, and that they had been sent in to him again by mistake or something of that kind. I think, therefore, that the Board of Trade made an order which ought not to stand; but, at the same time, I think they have acted perfectly properly in raising this question and having it decided. There is no question but that Mr. Hasluck, or somebody in his office, was negligent in this matter. He disregarded one of the duties of a trustee, which is to give notice of the rejection of a proof to the creditor whose proof has been rejected; and, also, I do not think it was a right thing to leave unnoticed such matters as the two letters of June 3 and 15. Either to the Inland Revenue authorities there ought to have been communicated the fact that the trustee supposed their claim had been finally rejected, and that he was now applying for his release, or he ought to have informed the Board of Trade that the claim appeared still to be open and left them to deal with it. I therefore think the trustee ought not to be allowed any costs. The order of revocation, therefore, will be discharged, but without costs.

Solicitors for trustee: *G. Reader & Co.*
Solicitor for Board of Trade: *Murton.*

H. L. F.

In re DAVIDSON.
Ex parte DAVIDSON.

1899
May 10.

Solicitor—Costs of Inquiry before Incorporated Law Society—Jurisdiction —Judge at Chambers.

Where a solicitor has been exonerated from charges brought against him on an inquiry before the Committee of the Incorporated Law Society, under s. 13 of the Solicitors Act, 1888, an application by him for the costs of the inquiry must be made to the Divisional Court, and not to a judge at chambers.

APPLICATION by a solicitor for the costs of an inquiry before the Committee of the Incorporated Law Society.

The report of the committee had entirely exonerated the solicitor from the charges made against him.

John Strachan, Q.C., for the applicant. The Committee of the Incorporated Law Society, which by the Solicitors Act, 1888 (51 & 52 Vict. c. 65), has taken the place of the master, by whom such inquiries used to be made, has no power to give costs to a solicitor who has been acquitted of the charges made against him; but it has been held that the Court has jurisdiction to do so: *In re Lilley*. (1)

[CHANNELL J. Ought not this application to have been made at chambers?]

Lewis Thomas, for the respondent. The judge at chambers has no power to deal with the matter. By s. 13 of the Solicitors Act, 1888, the report of the committee shall have the same effect and shall be treated by the Court in the same manner as a report of a master of the Court, "and the Court may make such order thereon as to the Court may seem fit." The powers of a judge at chambers are given by s. 39 of the Judicature Act, 1873. As this section only transferred powers which judges already possessed before the passing of that Act, it does not affect the power given by the Solicitors Act. 1888. The word "Court" always applies to a Court in banc,

(1) [1892] 1 Q. B. 759.

1899

DAVIDSON, *In re.*

DAVIDSON, *Ex parte.*

and the words " Court or a judge " are used if it is intended to confer power on a judge at chambers: *Baker* v. *Oakes* (1); *Smeeton* v. *Collier*. (2) In *In re Howell Thomas* (3), where it was held that the application might be made at chambers, the application was made under s. 8 of the Attorney and Solicitor's Act, 1870, which says that the jurisdiction may be exercised " by the Court or a judge thereof."

DARLING J. We think that this application for costs must be made to the Court, and not to a judge in chambers. It is clear that the old practice, when the master used to have the matter referred to him to make the kind of report which is now confided to the Incorporated Law Society, was that applications upon the report were made to the Court sitting in banc, and any question of costs was then dealt with by the Court, and not by a judge in chambers. I think that the case of *Smeeton* v. *Collier* (2) shews that, where jurisdiction is given to this Court by the term " the Court," this Court has power to delegate that jurisdiction to a single judge, unless the Legislature has provided that it is the Court, and not a single judge, who shall do the work. I think that the Court has power in the arrangement of its business, as was pointed out in *Smeeton* v. *Collier* (2), to make a rule that a judge in chambers—that is, that the Court, by means of one of its judges who may be sitting in chambers—shall do that which the Legislature has said the Court shall have power to do. I think, therefore, that although originally this kind of power was exercised by the Court sitting in public, as we are now sitting, it is perfectly competent for the Court to order that the matter shall be disposed of by one of the judges of the Court sitting in chambers. That would no doubt require a rule to be made by the Rule Committee, and one can see that it would be a great convenience that such a rule should be made; but as it has not been made, I do not think that a judge at chambers in this case has power to hear this application, and therefore that we must hear it.

(1) (1877) 2 Q. B. D. 171. (2) (1847) 1 Ex. 457.
(3) [1893] 1 Q. B. 670.

CHANNELL J. I am of the same opinion. There is no doubt a rule could be made, and I think it should be made, that where the report is in favour of the solicitor the speedier and cheaper mode should be adopted of going to a judge at chambers, which can be done upon two days' notice, instead of setting the case down in the opposed motion list before the Divisional Court. I think it would be very desirable that that should be done if possible, and that is why I have been looking to see whether it could not be done now. But I think the power that is given by the statute is the power to deal with this report in the same way as the report of a master used to be dealt with, and that power is given to the Court, and not to the Court or a judge. The result is that it is the Court, and the Court only, that can deal with it at present. It was only the Court that referred matters to the master, and in practice they frequently directed that the matter should be disposed of finally at judges' chambers. That was done by the order of the Court, who made that order because the Court then only sat during term time, and it was exceedingly inconvenient at certain periods to postpone the matter until the next term. That, therefore, was done in court, and it seems to me it is a power that is still possessed by the Court, and that can be exercised by the Rule Committee.

[The Court then heard, and in the result allowed the application.]

Solicitor for appellant: *J. W. Browne.*

Solicitors for respondent: *Ford & Ford, for Purvis, South Shields.*

A. P. P. K.

C. A.
1899
May 16.

[IN THE COURT OF APPEAL.]

WYATT *v.* PALMER.

Practice—Striking out Statement of Claim—Claim to set aside Judgment by Default on ground of Fraud—Claim for maliciously presenting a Bankruptcy Petition without alleging Special Damage—Order XXV., *r.* 4; *Order* XXVII., *r.* 15.

An action will lie to set aside a judgment by default on the ground of fraud; but if recourse is had to an action instead of the summary procedure upon an affidavit of merits under Order XXVII., r. 15, *quære* whether the Court may not in a proper case order payment into court of the sum due on the judgment as a condition of allowing the action to proceed.

Quære, whether an action will lie without an allegation of special damage for falsely and maliciously and without reasonable or probable cause presenting a bankruptcy petition, and the question is not one which will be determined upon an application to strike out the statement of claim as disclosing no reasonable cause of action.

THIS was an appeal from an order of Kennedy J. in chambers.

The plaintiff by his statement of claim alleged that on December 14, 1895, the defendant, who was a solicitor, by falsely pretending to the plaintiff that his, the defendant's, proper costs for services rendered to the plaintiff down to that date exceeded 650*l.*, induced the plaintiff to sign an agreement purporting to agree the defendant's costs at that sum, and to charge certain shares in favour of the defendant to secure that amount and interest (pars. 1, 2, 3); that subsequently the defendant delivered two bills of costs for services rendered since the date of the agreement for 275*l.* 3*s.* 9*d.* and 201*l.* 11*s.* 5*d.*, and commenced an action against the plaintiff for the balance alleged to be due on those bills (pars. 4 and 5). The statement of claim then proceeded as follows:—

"6. The plaintiff was entitled and desirous to have the said two bills of costs properly taxed, and instructed the solicitor then acting for him to take proceedings to have such bills taxed, whereupon the defendant, by threatening the plaintiff that if the plaintiff insisted on taxing the said bills he, the

defendant, would take proceedings against the plaintiff to enforce the said agreement of the 14th of December, 1895, and representing to the plaintiff that the defendant only desired to obtain a judgment in the said action in order to be in a proper position and would let the payment of the sum for which the said action was brought stand over until such time as was convenient to the plaintiff, induced the plaintiff to refrain from having the said bills of costs taxed, and to allow the defendant to enter judgment in the said action against the plaintiff for the sum of 221*l.* 1*s.* 8*d.* and costs. Such judgment was entered in such action on the 12th of July, 1897, and subsequently, namely, on the 21st of July, 1897, the defendant obtained an order charging the interest of the plaintiff in 3171 shares in James Wyatt, Limited, as security for the payment of the amount due on the said judgment.

"7. On the 11th of November, 1897, the defendant presented a petition in bankruptcy against the plaintiff alleging therein that the plaintiff was justly and truly indebted to him in the sum of 844*l.* 7*s.* 6*d.*, as to 635*l.* 11*s.* 8*d.* for moneys due under the said agreement of December 14th, 1895, and as to 228*l.* 15*s.* 10*d.* for the amount due on the said judgment, and also alleging that the plaintiff had committed acts of bankruptcy, namely, that, with intent to defeat and delay his creditors, the plaintiff, on or about the 31st of July, 1897, had departed out of England, and with intent to defeat and delay his creditors remained out of England on or about the 11th of November, 1897. In the said petition the defendant valued the security which he held on the property of the plaintiff at the sum of 700*l.* The defendant further by an affidavit made by him in support of the said petition swore that the said allegations were within his own knowledge true."

The plaintiff further alleged that the petition was dismissed with costs, and that he subsequently obtained an order of the Court setting aside the agreement of December 14, 1895, and ordering the defendant to deliver bills of costs (pars. 8 and 9). The statement of claim concluded as follows:—

"11. The proceedings in bankruptcy instituted by the defendant against the plaintiff were taken and the said petition

C. A. 1899

WYATT v. PALMER.

was presented and prosecuted, and the affidavit in support thereof was made, falsely and maliciously and without reasonable or probable cause. The allegations in the said petition and affidavit that the plaintiff was indebted to the defendant in a sum sufficient to support a bankruptcy petition and that the plaintiff had committed the alleged acts of bankruptcy were false to the knowledge of the defendant, and were made maliciously and without reasonable or probable cause.

"12. The said judgment in the said action was obtained against the plaintiff by the fraud of the defendant, and the plaintiff is entitled to have the same set aside and to have the bills of costs for 275*l.* 3*s.* 9*d.* and 201*l.* 11*s.* 5*d.* taxed.

"13. By reason of the said proceedings in bankruptcy falsely and maliciously taken and prosecuted as aforesaid, the plaintiff has suffered in his credit and reputation, and has been put to expense in defending himself and obtaining the dismissal of the said proceedings, and having the said agreement set aside and the said costs and charges of the defendant taxed."

The plaintiff claimed—(1.) damages in respect of the bankruptcy proceedings; (2.) the setting aside of the judgment; and (3.) an order for taxation of the bills of costs.

On April 11, 1899, the defendant applied in chambers that so much of the statement of claim as claimed damages for maliciously presenting the petition should be struck out, on the ground that without an averment of special damage it disclosed no reasonable cause of action, and that the remainder of the statement of claim should be struck out unless the money secured by the judgment was paid into court or secured. The master refused to strike out the statement of claim, and his refusal was confirmed by Kennedy J. in chambers.

The defendant appealed.

Joseph Walton, Q.C., and *Montague Lush*, for the defendant. 1. Where a judgment has been obtained by default and is regular, an action will not lie to set it aside, but the practice has always been to proceed summarily upon an affidavit of merits. That practice has been embodied in Order XXVII., r. 15, and that is the only proper mode of procedure. The judgment now sought

to be impeached has been obtained in a common law action for debt, and if the present action is allowed to proceed there need be no affidavit of merits and no payment of the money into court, and the Court will be deprived of the safeguards provided by the ordinary mode of procedure. By a series of actions of this kind the day of payment may be indefinitely postponed: see *Flower* v. *Lloyd*. (1)

In *Priestman* v. *Thomas* (2) and *Cole* v. *Langford* (3) an action to impeach a judgment on the ground of fraud was held to be sustainable; but those cases are distinguishable.

2. An action for damages for malicious bankruptcy proceedings will not lie unless special damage is alleged and proved, and the obligation to pay costs is not special damage: see *Quartz Hill Gold Mining Co.* v. *Eyre*. (4)

For these reasons the statement of claim ought to be struck out under Order XXV., r. 4, as disclosing no reasonable cause of action.

Lawson Walton, Q.C., and *Muir Mackenzie*, for the plaintiff.

LINDLEY M.R. This is not a case in which the action ought to be summarily stopped. I say nothing about the merits, but it does not strike me as being at all a plain case. The first point raised by the appellant is important. Judgment has been obtained against the plaintiff by default. Thereupon the plaintiff brings an action to impeach that judgment on the ground that it was obtained by fraud. It is said that no such action will lie. That proposition is so new to me that, as an equity lawyer, I was startled by it. That an action could not be brought to impeach a decree or judgment on the ground of fraud was a surprise to me. I was familiar with such actions when at the Bar; and I have refreshed my memory by referring to Mitford on Pleadings, where I find this: "If a decree has been obtained by fraud it may be impeached by original bill without the leave of the Court" (5th ed. p. 112). Why should not a judgment by default be so impeached? Suppose a man was induced by fraud not to appear, and by

(1) (1877) 6 Ch. D. 297; (1879) 10 Ch. D. 327.

(2) (1884) 9 P. D. 210.

(3) [1898] 2 Q. B. 36.

(4) (1883) 11 Q. B. D. 674.

C. A. 1899

WYATT v. PALMER.

Lindley M.R.

that means judgment was obtained against him: I am not prepared to say that because there is a summary method of impeaching that judgment provided by the Rules recourse cannot be had to the old method of impeaching the judgment by action. The old jurisdiction of the Court is not touched or taken away by the rule in question. But then there is a subsidiary question. The Rules having provided a short method of getting a judgment set aside upon such terms as may be just—namely, by an application in chambers—it is worthy of consideration whether, if the plaintiff chooses not to avail himself of that method but to have recourse to the more dilatory method of bringing an action, he should not be put upon terms. There is much to be said for that. But it would not be right in this case to order the money to be paid into court as a condition of allowing the action to proceed, because the defendant must be taken to have admitted that he is a secured creditor. Therefore I pass that over. As a general proposition, I think it dangerous and undesirable to summarily stop an action to set aside a judgment on the ground that it has been obtained by fraud.

The other point is less important. It is said that this action is frivolous, in so far as it is founded on malicious proceedings in bankruptcy. It is contended that such an action will not lie unless special damage is alleged. I do not know how that may be, but the point is certainly not so clear as to justify the Court in stopping this action as frivolous. I am by no means satisfied that the action will not lie without alleging special damage, especially after the decision of the Court of Appeal in the *Quartz Hill Gold Mining Co.* v. *Eyre* (1), and especially after the alterations in the law of bankruptcy whereby a non-trader as well as a trader may be made a bankrupt. The action must go on and be disposed of on its merits. The appeal must be dismissed with costs.

RIGBY L.J. concurred.

Appeal dismissed.

Solicitors: *Lindo & Co.; S. R. Pollard.*

(1) 11 Q. B. D. 674.

H. B. H.

MOSS *v.* HANCOCK.

1899
April 18;
May 6.

Criminal Law—Restitution of Stolen Property—Current Coin of the Realm—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 100.

A coin which is current coin of the realm may be sold as a curiosity, and in such a case, if the seller is a thief who has stolen it from the owner and who has subsequently been prosecuted to conviction, an order for its restitution to the owner may be made under s. 100 of the Larceny Act, 1861 :—

Semble, that no such order could be made if the coin had been passed into circulation as current money, although it might be possible to identify it.

A thief stole from the respondent a five-pound gold piece (which by Royal proclamation had been made current coin of the realm) and changed it with the appellant, who was a dealer in curiosities, for five sovereigns :—

Held, that under the circumstances the coin had not been received by the appellant as current coin, and that an order might be made under s. 100 of the Larceny Act, 1861, ordering the appellant to restore it to the respondent.

CASE stated by justices under the Summary Jurisdiction Acts.

On December 5, 1898, one Thomas Neale was charged before the Hove justices for that he, while being a servant in the service of the respondent, feloniously did steal, take, and carry away one gold five-pound piece and other articles the property of the respondent, his master. Neale pleaded guilty, and was convicted and sentenced. The magistrates then made an order that the five-pound gold piece which was produced in evidence should be restored to the respondent.

It appeared that Neale was a butler in the service of the respondent at Hove, and that the five-pound gold piece was presented to the respondent by the committee of the Goldsmiths' Company in the year 1887, and bore the date of that year.

The gold piece was always kept by the respondent in a case in a cabinet in his drawing-room, and it had never been in circulation. Together with other property, it was stolen by Neale from the respondent's residence on November 20, 1898.

The appellant was a dealer in new and second-hand clothes,

1899

Moss v. Hancock.

jewellery, and other articles, and Neale changed the five-pound gold piece with the appellant's son at the appellant's shop at Brighton for five sovereigns.

The appellant's son stated in evidence that he made no inquiries of Neale respecting the five-pound gold piece, but that he knew Neale was an indoor servant and had known him some little time as a customer, but he refused to say whether he had known him for a week or a year, or for any definite time. The appellant contended that the five-pound gold piece was current coin of the realm, and was received as such by his son, who gave five sovereigns for it without any knowledge that it had been stolen, and that the appellant was therefore entitled to retain it.

The justices were of opinion that under s. 100 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), and s. 27, sub-s. 3, of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), they ought to order the restitution of the five-pound gold piece to the respondent, as they found as a fact that the same was his property, and had been stolen and parted with in manner hereinbefore mentioned, and they accordingly made an order for its restitution.

At the request of the appellant, they stated this case for the opinion of the Court, but submitted that the question was a question of fact, and doubted whether they had jurisdiction to state a case.

Firminger, for the appellant. The justices had no jurisdiction to order the restitution of this five-pound gold piece. By Royal proclamation in 1887, made under the provisions of the Coinage Act, 1870, five-pound gold pieces were declared to be current coin and legal tender. No doubt s. 100 of the Larceny Act, 1861, under which the justices purported to make the order (1), speaks of "money," but the "money" there referred

(1) By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100, "If any person guilty of any such felony or misdemeanour as is mentioned in this Act in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of or knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on behalf of the owner of the property or his executor or administrator and convicted

to is specific money set apart in a box or bag, and does not refer to money in actual circulation. The first statute on the subject was 21 Hen. 8, c. 11, and under that statute it was held that there could be restitution either of money actually found in the possession of the thief or of money which was in some way ear-marked, as by being in a box or bag: *Holiday* v. *Hicks*. (1) In a similar manner an order might be made for the restitution of the proceeds of stolen property: Hale's P. C. 541; but there is no power to make an order for the restitution of money which has once been put in circulation: *Miller* v. *Race* (2); the reason being (as is there pointed out) that such money cannot be identified. The 21 Hen. 8, c. 11, was repealed by 7 & 8 Geo. 4, c. 27, and re-enacted by 7 & 8 Geo. 4, c. 29, s. 57, by which it was extended to misdemeanours. The 7 & 8 Geo. 4, c. 29, was repealed by 24 & 25 Vict. c. 95. Looking at the present enactment, it is plain from the proviso that the Legislature did not contemplate an order being made for the restitution of current coin which had passed into circulation.

Boxall, for the respondent. The order for restitution was right. Admitting that the five-pound piece was current coin

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thereof, in such case the property shall be restore to the owner or his representative, and in every case in this section aforesaid the Court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: Provided that if it shall appear before any award or order made that any valuable security shall have been bonâ fide paid or discharged by some person or body corporate liable to the payment thereof or being a negotiable instrument, shall have been bonâ fide taken or received by transfer or delivery by some person or body corporate for a just and valuable consideration without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanour been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the Court shall not award or order the restitution of such security. . . ."

By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27, "Where an indictable offence is . . . . authorized to be dealt with summarily. . . . .

"(3.) The conviction for any such offence shall be of the same effect as a conviction for the offence on indictment, and the Court may make the like order for the restitution of property as might have been made by the Court before whom the person convicted would have been tried if he had been tried on indictment."

(1) (1598) Cro. Eliz. 638, 661.

(2) (1791) 1 Burr. 452; 1 Sm. L. C. 10th ed. p. 447.

1899

MOSS v. HANCOCK.

and legal tender, it was not passed as current coin on this occasion, but was sold to the appellant as a curiosity. Money which is current may nevertheless have a special value and be sold as a curious or rare coin. But, even if it were passed as current coin, there is nothing to prevent an order from being made for its restitution if it can only be identified. The statute expressly speaks of the restitution of money, and the only difficulty that arises is as to the identification of the particular coins stolen. It is plain that money can be restored if it is found in the possession of the thief, and if the money stolen has been passed away by him and yet can be identified as the actual coin stolen by him, then an order for its restitution can be made. The doctrine that money has no ear-mark merely refers to the difficulty of identification. [He cited *Scattergood* v. *Silvester* (1); *Taylor* v. *Plumer* (2); *Rex* v. *Stanton*. (3)]

Firminger, replied.

Cur. adv. vult.

May 6. DARLING J. read the following judgment:—This was a special case stated by justices, and the following facts were stated as proved or agreed. The prisoner, a butler in the service of the respondent, was convicted of having stolen from his master a five-pound gold piece, presented by the Goldsmiths' Company to the respondent in the Jubilee year, 1887, the year of its date. The gold piece had been kept in a cabinet until November, 1898, when it was stolen by the prisoner, and had never been in circulation. The appellant is a dealer in new and second-hand clothes, jewellery, and other articles; and the prisoner changed the gold piece with the appellant's son in the appellant's shop for five sovereigns. Upon the prisoner's conviction the justices found that the five-pound gold piece stolen by the prisoner was the respondent's property, and they made an order for its restitution to the respondent, acting under the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100, and the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27, sub-s. 3. It was admitted during the argument that the gold

(1) (1850) 15 Q. B. 506. (2) (1815) 3 M. & S. 562.
(3) (1836) 7 C. & P. 431.

pieces of the issue to which this one belonged are, by Royal proclamation, constituted current coin of the realm; and for the appellant it was contended that the order for restitution was therefore wrong. By s. 100 of the Larceny Act, 1861, it is provided that, on the prosecution to conviction of a thief, the Court may order the restitution of the things stolen to the prosecutor, and, among other stolen things, may order the restitution of money. It was contended before us in this case that although, even after they had been sold by the thief in market overt and so the property in them had passed, stolen goods might still, by virtue of an order under this statute, be revested in the owner from whom they had been stolen, yet no such restitution could be ordered of money, unless it were money in a bag or otherwise "ear-marked," as it was said. For this proposition decisions given in actions for trover and conversion of money were cited such as *Holiday* v. *Hicks*. (1) But s. 100 of the statute distinctly applies to "money"; and long before this it was stated in Hale's Pleas of the Crown, p. 542: "So if money be stolen, and the thief taken, and the money seized, he (that is, the true owner) shall have restitution of the money." Reliance was also placed on the case of *Miller* v. *Race* (2), which was an action of trover upon a bank-note, in which case it was held that the property in such a note passes like cash by delivery. And Lord Mansfield there said: "Now they (bank-notes) are not goods, nor securities, nor documents for debts, nor are so esteemed, but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash." Further on in his judgment Lord Mansfield said, referring to some expression attributed to Holt C.J., "'Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said that 'the reason why money cannot be followed is because it has no ear-mark'; but

(1) Cro. Eliz. 638, 661. (2) 1 Burr. 452; 1 Sm. L. C. 10th ed. p. 447.

1899

Moss v. Hancock.

Darling J.

this is not true. The true reason is upon account of the currency of it; it cannot be recovered after it has passed in currency. So, in case of money stolen, the true owner cannot recover it, after it has been paid away fairly and honestly upon a valuable and bonâ fide consideration; but before money has passed in currency, an action may be brought for the money itself." Now, here it is plain that the mere fact that the stolen gold piece was money would not render it unfit for the application to it of an order for restitution. The true question seems to me to be whether by the manner of dealing with it which the thief adopted the gold piece passed in currency. The exchanging of a coin for other coins is not conclusive proof that the exchanging was that of dealing with current coin on both sides. Many coins, which yet have not been formally withdrawn from currency, have a price far beyond their denominated value, by reason of their antiquity or rarity, or for their beauty of design or execution (though this last is perhaps merely to say again by reason of the coins being struck in another age and mint than ours). Money as currency, and not as medals, seems to me to have been well defined by Mr. Walker in "Money, Trade, and Industry" (1) as "that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities." Bearing in mind all the foregoing considerations, and applying them to the facts stated for us by the magistrates, I ask myself was this gold piece passed on in its character as coin of currency, or was it rather the subject of a sale as an article of virtù. We are permitted to draw inferences from the facts stated to us; and besides it was stated in the course of the argument that this piece was of somewhat greater value than that of its denomination, and so was worth more than the five pieces given in exchange for

(1) F. A. Walker, "Money, Trade, and Industry," p. 4, cited in Encyclopædia Britannica, sub tit. "Money."

it, though each of those was of a fifth of the nominal value of this gold piece. Upon the facts stated I come to the conclusion that this gold piece never passed in currency, though it was the subject of a sale (as a medal might have been) to a dealer in old or curious things; and that, therefore, the magistrates acted within their powers in making an order for its restitution.

Channell J. read the following judgment:—I entirely agree with the judgment that has just been delivered, but as I have prepared a judgment of my own, I think it well to deliver it.

In this case, stated by magistrates, an appellant appeals against an order made under s. 100 of the Larceny Act, ordering him to restore to the prosecutor a five-pound gold piece stolen from him by a thief who has been convicted. The magistrates suggest a doubt whether they have power to state a case, but I think that there is no foundation for this doubt. The magistrates next suggest that the whole question is one of fact. They leave us, however, in some doubt as to what they mean to find. In one view it is a question of fact, in another one of law. They state certain facts, but they do not state what inference they draw from them. That being so, we have power under the rules of Court to draw any inferences which the magistrates might have drawn. The facts have been already fully stated, and I think the proper inference to be drawn from those facts is that the thief did not pass the coin as current money, but sold it for 5*l*. It is true that, by Royal proclamation issued under the Acts of Parliament relating to the coinage, this piece is made current coin of the realm, and might have been used in payment of a debt or otherwise as money; but though it might be so used, it might also be dealt with as if it were a medal, or ancient coin, or other curiosity. I think it was offered to the appellant because he dealt in curiosities, and was taken by him as such.

It is also doubtful whether the magistrates meant to find the transaction bonâ fide. Without meaning to suggest that the appellant's son could be found guilty of receiving the coin knowing it to be stolen, I still think the circumstances were

1899

Moss v. Hancock.

Channell J.

such that the magistrates might well find that it was not taken bonâ fide, so that, if it had been a bill of exchange or other negotiable instrument, no better title would have been taken than the thief had. If that was the view of the magistrates, they would be right in considering the question one of fact; and if it was not their view, much that they state in the case is wholly immaterial. Under these circumstances we ought to draw the inference ourselves, and upon that inference I think the order of the magistrates a good one.

If the coin had been dealt with and transferred as current coin of the realm, as, for instance, in payment for goods purchased or in satisfaction of a debt, or bonâ fide changed as money for money of a different denomination, I think a question of law of great difficulty would arise. If that were the case, no doubt the property would have passed to the appellant; but the operation of the statute is to revest in the prosecutor, on conviction of the thief, the property in the thing stolen, notwithstanding that the property in it has previously passed effectively to a transferee as by sale in market overt: *Horwood* v. *Smith* (1); *Scattergood* v. *Silvester*. (2) The history of the matter is to be found in 2 Hawkins's Pleas of the Crown, c. 23, ss. 49–57. The mere fact of the property in the coin having passed would not, therefore, prevent the statute operating, and it is curious that in all the statutes, beginning with that of 21 Hen. 8, c. 11, money stolen is placed on the same footing as chattels stolen. Unless, therefore, there is something exceptional in the way in which property in money passes, it would appear that, in all cases where by some accident the particular coin or coins stolen could be identified at the date of the conviction, the person then owning them would lose his property though the money had been taken bonâ fide. But we have to consider the proviso which was in the statute of George IV. as well as in the present statute, protecting persons who had bonâ fide taken a negotiable instrument. Now, all the considerations which could have induced the Legislature to protect holders of stolen negotiable instruments must equally apply to stolen money taken bonâ fide. In fact, it is because

(1) (1788) 2 T. R. 750. (2) 15 Q. B. 506.

bills of exchange, &c., are like currency that they are negotiable: see *Miller* v. *Race*. (1) It may be that the Legislature did not think it necessary to protect, by including them in the proviso, persons who had bonâ fide taken stolen money, because in the great majority of cases it would be impossible, in fact, to identify the money, so that only in rare cases would protection be wanted; but that hardly seems satisfactory. It seems to me that the Legislature must have assumed that persons having bonâ fide taken stolen money did not come within the statute. The matter is very doubtful; but, on the whole, I think the explanation may be this: it may be that the true meaning of the saying that money has no ear-mark is that when current coins of the realm have passed bonâ fide from hand to hand as currency and as money they are considered, for all purposes of property in them, not to be identifiable. They become merely so much money in the possession of the person to whom they have passed. If it is a sovereign, then for all purposes of the property twenty shillings or eight half-crowns are the legal equivalent of the sovereign. If the payment to the man has been made in error the right against him is, as a rule, merely to recover so much money, and not the identical coins. A man cannot, as a rule, be convicted of larceny as a bailee of money: *Reg.* v. *Hassall*. (2) Of course, this view in no way prevents a servant or agent being liable to hand over identical coins received to his master. The point only arises upon the passing of the coins from one person to another as money. The doctrine that money has no ear-mark, whatever it means, is undoubtedly a doctrine of our law. Lord Mansfield, in *Miller* v. *Race* (1), criticized the expression, not as being incorrect, but as not being the true reason why the property in money passed on transfer independently of the title of the transferor. The doctrine is discussed and explained both in *Taylor* v. *Plumer* (3) and in the judgments of Sir George Jessel and Thesiger L.J. in *In re Hallett's Estate*. (4) I think the view which I have suggested as to money, on its being dealt with and passed as money

(1) 1 Sm. L. C. 10th ed. p. 447.
(2) (1861) L. & C. 58; 30 L. J. (M.C.) 175.
(3) 3 M. & S. 562.
(4) (1879) 13 Ch. D. 696.

1899

Moss v. Hancock.

Channell J.

bonâ fide, being treated in law as having lost its identity, and being merely so much money in the hands of the person who took it, is really consistent with all the cases, if not with all the dicta. If it is correct, it makes the 100th section of the Larceny Act, 1861, work as one would expect. I cannot think that if a thief steals a sovereign and buys some article of small value with it in a shop and goes away with the article and the change, and then by reason of some accidental circumstance, such as the shopkeeper happening to have no other sovereign in his till at the time, the coin can be identified in fact, that, upon conviction of the thief, the shopkeeper loses his title to the sovereign. I incline to think that the effect of the 100th section of the Larceny Act, so far as money is concerned, is limited to cases where the money stolen or the proceeds of it are found on the thief, or in the possession of some one taking from him otherwise than by the money passing as currency. When the statute of Henry VIII. was passed its most important effect probably was the same as the effect of an appeal and writ of restitution in the older procedure: see 2 Hawkins's Pleas of the Crown, c. 23, ss. 49–57—namely, to prevent forfeiture to the Crown or to any lord having right to waifs or estrays or goods of felons; but all that is now obsolete.

I have thought it right to discuss the questions of law which were argued before us; but, as I have already said, the points do not arise upon the inference which I think it right to draw from the facts stated.

I think that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *H. Clifton, for Plumbridge, Brighton.*

Solicitors for respondent: *Venn & Woodcock, for T. A. Goodman, Brighton.*

A. P. P. K.

BREARLEY *v.* MORLEY.

1899
May 30.

Licensing Acts—Music—Innkeeper providing Piano—Public Health Acts Amendment Act, 1890 (53 & 54 *Vict. c.* 59), *s.* 51.

A licensed victualler had in the public smoke-room of his house a pianoforte on which customers were in the habit of playing for the amusement of themselves and others resorting to the room. He made no extra charge either for the use of the piano or for the entertainment thus afforded, nor did he pay or encourage the performers. He was convicted under s. 51 of the Public Health Acts Amendment Act, 1890, for having kept or used the room for public entertainment without a licence for the purpose:—

Held, that the conviction was wrong.

CASE stated by justices under the Summary Jurisdiction Acts.

On December 23, 1898, an information was preferred against the appellant, charging that he, as the occupier of a room forming part of a house known as the West End Hotel, in the borough of Batley, had unlawfully kept and used it for public singing and music without a licence.

It appeared that the appellant was and had been for some years a licensed victualler and the occupier of the fully licensed inn, alehouse, or victualler's house known as the West End Hotel, in Batley. No licence for public singing and music, or for any other public entertainment of the like kind, had been granted to the appellant under s. 51 of the Public Health Acts Amendment Act, 1890.

The appellant had for some time kept a pianoforte in one of the rooms of the West End Hotel, which room was used by the public and was the smoke-room of the hotel.

At 10.25 on December 17, 1898, being an hour at which the house was open to the public for the sale of intoxicating liquors, a number of men were assembled in this room: one man was playing on the pianoforte an accompaniment for another man who was singing a song, and other men were sitting round the room listening and talking. The performers were ordinary customers at the hotel, and were not servants of the appellant, or in any way paid or remunerated by him for

1899

BREARLEY v. MORLEY.

their performances; but they performed gratuitously and of their own free will and accord.

Pianoforte music and music and singing of the same nature took place and was performed by customers, who were able and willing to play and sing, for the entertainment and amusement of themselves and their friends and the customers, who might be present in the room, almost always on Saturday evenings, and sometimes on Friday evenings, and generally at feast times and holidays.

No charge was made for admission to the room where such music and singing took place, the usual price being charged for the actual refreshments ordered by and supplied to customers.

The appellant knew of and knowingly permitted this user of the room.

Part IV. of the Public Health Act Amendment Act, 1890 (1), has been duly adopted by the local authority for the borough of Batley.

The justices were of opinion that the user of the room for music and singing was so frequent that it was in fact ordinary and habitual; and, further, that the room was kept and used for the purpose of public singing and music within the meaning of the Act; and they therefore convicted the appellant, but stated this case for the opinion of the Court.

J. Beverley, for the appellant. The conviction was wrong. The room was not kept or used for the purpose of any public

(1) By the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part IV., s. 51, "(1.) A house, garden, room, or other place, whether licensed or not for the sale of wine, spirits, beer, or other fermented or distilled liquors, shall not be kept or used for public dancing, singing, music, or other public entertainment of the like kind without a licence for the purpose or purposes for which the same respectively is to be used first obtained from the licensing justices of the licensing district in which the house, room, garden, or place is situate . . . .

"(5.) Any house, room, garden, or place kept or used for any of the purposes aforesaid without such licence first obtained shall be deemed a disorderly house, and the person occupying or rated as occupier of the same shall be liable to a penalty not exceeding five pounds for every day on which the same is kept or used for any of the purposes last aforesaid."

entertainment. There is no offence in a hotel-keeper having a piano in his house for the use of his customers.

Roskill, for the respondent. The conviction was right. The entertainment was open to the public unrestrictedly, and it was habitual, as the justices find. That is sufficient to constitute the offence, as is plain from the decisions on the former statute, 25 Geo. 2, c. 36, s. 2, which was in less stringent terms: *Marks* v. *Benjamin* (1); *Gregory* v. *Tuffs* (2); *Archer* v. *Willingrice* (3); *Bellis* v. *Beal* (4); *Bellis* v. *Burghall* (5); *Shutt* v. *Lewis* (6); *Hall* v. *Green*. (7)

DAY J. I am clearly of opinion that this conviction cannot be supported. It does not seem to me that any offence at all was committed. The hotel-keeper provided a piano in his smoking-room just as he provided tables and chairs, and the piano was used by the customers frequenting the room. The appellant did not provide any music or other public entertainment; he only provided a piano, and allowed his customers to use it for the purpose of solacing themselves with the music. I do not think that there was any habitual user of the room by the customers for the purpose of any public entertainment. They only used the piano on Saturdays, and sometimes on Fridays, and the appellant neither encouraged them nor forbade them. I cannot see that he provided any public entertainment at all, or that he committed any offence against the statute. He did not keep or use the room for any of the purposes forbidden by the Act, and the conviction was therefore wrong, and must be quashed.

LAWRANCE J. I agree.

Conviction quashed.

Solicitors for appellant: *Ullithorne, Currey & Co., for James Law, Batley.*

Solicitors for respondent: *Badham & Williams, for Trevor Edwards, Wakefield.*

(1) (1839) 5 M. & W. 565.
(2) (1833) 6 C. & P. 271.
(3) (1802) 4 Esp. 186.
(4) (1797) 2 Esp. 592.
(5) (1799) 2 Esp. 722.
(6) (1804) 5 Esp. 128.
(7) (1853) 23 L. J. (M.C.) 15.

A. P. P. K.

C. A.
1899
April 29.

[IN THE COURT OF APPEAL.]

JONES *v.* OCEAN COAL COMPANY, LIMITED.

Employer and Workman—Compensation—Personal Injury by Accident—Average Weekly Earnings—Break in Employment—Strike—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clause* 1 (*b*).

By Sched. I., clause 1, of the Workmen's Compensation Act, 1897, "The amount of compensation under this Act shall be . . . . (*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

A workman was employed by a firm of coalowners from October 3, 1897, to March 31, 1898, when the workman went out on strike and the contract of employment was duly determined by notice. He remained on strike for five months, and on September 12, 1898, again entered the service of the same employers under a fresh contract of employment containing different terms; on October 3, 1898, he was injured by an accident arising out of and in the course of his employment:—

Held, that the period of employment contemplated by Sched. I., clause 1 (*b*), was a substantially continuous employment during which the relation of master and servant substantially existed between the employer and workman, and that therefore, in ascertaining the workman's average weekly earnings, regard could only be had to the period of employment between the end of the strike and the date of the accident, the employment before the strike having been duly determined by the act of the parties.

Appeal from the decision of the judge of the county court of Merthyr Tydvil upon an application to assess compensation under the Workmen's Compensation Act, 1897.

The application was made by the appellant, Thomas Jones, who was injured on October 3, 1898, while in the employment of the respondents, the injury arising out of and in the course of his employment. From a date as early as October 3, 1897, the appellant had been working for the respondents, who were colliery owners, under an agreement fixing the rate of wages, bearing date January 1, 1892, and known as the sliding scale agreement. This agreement was terminated by a six months'

notice given by the workmen under a clause in the agreement to that effect, the individual contracts between the employers and the workmen being terminated by a notice given by the employers under another clause of the agreement; this notice expired on March 31, 1898. After this date the men ceased to work; a strike or lock-out, known as the South Wales strike or lock-out, commenced on April 1, 1898, which lasted until September 5, 1898. The appellant had worked for the respondents up to March 31, 1898, but did not work for them during the strike or lock-out. On September 12, 1898, he resumed work for the respondents under a new contract, differing in its terms from the old contract, and on October 3, 1898, he was injured by the accident in respect of which he now claimed compensation. The appellant contended that under clause 1 (*b*) of Sched. I. of the Workmen's Compensation Act his average weekly earnings, upon which the amount of compensation was to be calculated, were his earnings for the period between September 12, 1898, and the date of the accident, in which case the award of compensation would be for 15*s.* 9*d.* per week; the respondents contended that the earnings for the twelve months before the accident should be taken and divided by the number of weeks during which the appellant was actually at work for the respondents, the strike period being excluded; on this basis the compensation would be 8*s.* 6*d.* per week. The county court judge decided in favour of the respondents' contention, and made an award for 8*s.* 6*d.* per week. The applicant appealed.

Cripps, Q.C., and *W. Denman Benson*, for the appellant. The county court judge was wrong in taking the period of employment before the strike and joining it to the period of employment after the strike in order to arrive at the average weekly earnings of the appellant. Clause 1 (*b*) of Sched. I. contemplates continuous employment under the same employer, whether the period of employment has been twelve months or a shorter period. This does no violence to the language of the clause, for the first part clearly contemplates a continuous employment for twelve months, and where under the second

C. A. 1899

JONES v. OCEAN COAL COMPANY.

part a lesser period than twelve months has to be resorted to, the employment must equally be continuous during that lesser period. Here the employment before the strike was absolutely terminated, and after the strike a wholly new contract of employment containing different terms was entered into by the appellant, who during the strike was under no contractual obligations to the respondents, but might have entered the service of another employer. In *Keast* v. *Barrow Hæmatite Co.* (1), where a break of a fortnight's holiday was treated as being no interruption of a continuous employment, there was never more than one employment under a single contract of employment. *Price* v. *Marsden* (2) is also clearly distinguishable, for in that case there was no break in the employment, but merely an alteration of certain of its terms.

Ruegg, Q.C. (*Arthur Lewis* with him), for the respondents. The average weekly earnings are to be calculated upon the wages actually earned during that part of the twelve months preceding the accident in which the workman has been in fact employed, and not upon an exceptional rate of wages earned for a short time. The words "if he has been so long employed" do not point to the necessity of the employment being continuous in point of time, and the proper course is to divide the wages actually earned in the twelve months by the number of weeks actually worked. The appellant was in fact in no other employment than that of the respondents during the twelve months preceding the accident, and therefore satisfies the language of the clause as having been in the employment of the same employer for a less period than twelve months, and should be compensated on the basis of his earnings during that period.

A. L. SMITH L.J. I am of opinion that this appeal should be allowed. It raises a short question under Sched. I. clause 1 (*b*), of the Workmen's Compensation Act, 1897. Before October 3, 1897, the appellant was in the employment of the respondents under, as the county court judge has found, the terms of an agreement of January 1, 1892. The judge has also found as a fact that this agreement was terminated by a six months' notice

(1) 15 Times L. R. 141. (2) [1899] 1 Q. B. 493.

given by the men, and that the individual contracts between the employers and the workmen were terminated by a notice given by the employers terminating on March 31, 1898. In the face of that finding it is impossible to hold that there was a continuous employment of the appellant from October 3, 1897, to October 3, 1898; he had gone on strike; he need not have returned to the respondents' employment, but might have got an engagement elsewhere. There was, as a fact, a break in the employment on March 31, 1898, and not merely a break, but an actual termination of it, for, after remaining out on strike for upwards of five months, the appellant asked to be taken on again, and was in fact taken again into employment on September 12, 1898, under an entirely new contract containing different terms to the one that had been duly terminated. The accident to the appellant happened on October 3, 1898, and the question for us is on what basis the compensation to which he is entitled is to be assessed. This depends entirely on the meaning of Sched. I., clause 1 (*b*), of the Act. That clause says in the first part, "where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed"; stopping there, I think that there must be a continuous employment during the twelve months to bring a workman within that provision; that is, a continuous relationship of master and servant. Then the clause proceeds, "but if not, then for any less period during which he has been in the employment of the same employer"; and I think that to satisfy that limb of the clause the employment also must be continuous. In my judgment the appellant has not been in the continuous employment of the respondents for the twelve months from October 3, 1897, to October 3, 1898, but only for the lesser period from September 12 to October 3, 1898, and that is the period which is to be taken as the basis for estimating the appellant's average weekly earnings. I think, therefore, that the appeal must be allowed, and the award amended by increasing the amount of compensation from 8*s*. 6*d*. to 15*s*. 9*d*. per week.

C. A. 1899

JONES v. OCEAN COAL COMPANY.

VAUGHAN WILLIAMS L.J. I agree; but I feel some hesitation as to the construction of the Act. It is a very difficult Act to construe, and until the present sittings I have not been called upon to construe it. I should, therefore, feel very diffident about taking a view different from that taken by the rest of the Court, and, as my Lord has been a party to every decision under the Act, I should be sorry, by differing from him, to cause any break in the continuity of these decisions. Though I think that the agreed facts relieve us of much of the difficulty of deciding in this case, I wish to guard myself against being a party to a construction of Sched. I., clause 1 (*b*), which might hereafter be found impossible of application. The argument has been so much on a question of law, and the facts have been so little touched upon, that I think it well to say a few words upon the facts as I understand them.

It is agreed that prior to the strike the appellant was employed on the terms of a contract of January 1, 1892, which as I read it dealt with two things: first, with the general terms of the contract agreed upon between the miners collectively and their employers; and, secondly, it provided that the rate of wages fixed therein should continue, subject to six months' notice. I do not understand, however, that the individual colliers were employed under that contract; it governed the rate of wages, but the men were employed under weekly or monthly contracts. The agreement contained a provision for its termination by a six-months' notice given by the men; and it was, in fact, an agreement made between masters and men to regulate the rate of wages, six months' notice being necessary in order to alter the rate. This notice the men gave, and the effect of the notice was that the agreement came to an end at the termination of the six months; I do not understand, however, that six months' notice was necessary to determine the employment of the individual workmen.

From my point of view this is a case in which, wholly irrespective of the existence of a strike, a particular workman chose for a number of months not to work for the respondents; after that period of time had expired, he came back and entered afresh into their employment. The question for us

arises thus: four weeks after the appellant had entered the respondents' service under this fresh contract of employment the accident happened to him. Are we, in calculating his average weekly earnings, to deal with the short period during which he was at work under the fresh engagement as being the factor in making the calculation; or are we also to take into consideration that he had been engaged by the same employers, and had worked for them in the early part of the year? Upon the facts of this particular case, I think that we ought to treat the later employment as the only employment, the period of which is to be treated as a factor in arriving at the average weekly earnings; and I say so for the following reasons.

If we look at Sched. I., clause 1 (*b*), whether we are dealing with the first or second half of the clause, that is, with a period of twelve months previous to the accident or with a less period, we find that the employment has to be continuous in this sense—that it must be an employment under the same master, during the period under consideration; in that sense we must find that there has been a continuity of employment. But must the employment be continuous during the whole twelve months (or lesser period) without any break in point of time? For myself I should say obviously not; it is impossible to find any employment as to which it would be literally true to say that there had been no break in point of time. The question is substantially whether the relation of master and servant existed during the whole of the period under consideration, and this applies equally to the lesser period mentioned in the second part of clause 1 (*b*) and to the period of twelve months in the first part. It seems to me that if the state of work were such that during the whole twelve months the master could only give three days' work a week to his men, it would still be true within the meaning of this clause to say that the workmen had been employed during the whole of the twelve months, for the relation of master and servant would have existed during the whole time. The real question is whether there has been any break in that relation. To answer that question we may put this test: Are the facts such that we can assume that the

C. A. 1899

JONES v. OCEAN COAL COMPANY.

Vaughan Williams L.J.

workman, if called upon to work, will do so, or that the employer, if asked to give employment, will allow the man to work? If there is a period of time during which that could not be truly assumed, then the relation of master and servant will have come to an end, and it is impossible to deal with any period of time during which the master and servant have respectively ceased to be willing to give and accept employment. It seems to me that in such a case as the present the relation of master and servant comes to an end, not because of a break in the temporal continuity of the employment, nor because on certain days there is no work for the servant to do, but because the master is not willing to employ or the servant is not willing to work, even if there is work for the one to give and the other to do. In this particular case I have come to the conclusion that in ascertaining the appellant's average weekly earnings we ought to take into consideration only that period of employment which was subsequent to the strike, for in my opinion during the strike the relation of master and servant had come to an end in a different sense than would have been the case if there had been a mere break in the employment for a week or a fortnight.

ROMER L.J. I agree with my Lord in the construction put by him upon Sched. I., clause 1 (*b*). Looking at the first part of the clause, which deals with the average weekly earnings during the previous twelve months, if the applicant has been so long employed, it seems reasonably clear that that employment is intended to be a substantially consecutive or continuous employment—that is to say, that to satisfy that part of the clause the workman must have been in a substantial sense in the same employment during the whole twelve months. For example, a man would not be within the clause if at the commencement of the twelve months' period he had worked for an employer for two months, and then had gone into the employment of another employer for some months, and had finally come back to finish the year with his first employer. Coming to the second part of the clause, which deals with any less period than twelve months during which the workman has been in

the employment of the same employer, I think that it means a period during which the workman has been in the substantially consecutive or continuous employment of the same employer up to the date of the accident. It may be worthy of notice that the word "period" is used in the singular, not in the plural. I do not think that it was intended by the second part of the clause that, in considering the less period than twelve months, we were to look back and add together a series of periods of employment, although periods may intervene in which the workman had nothing to do with the employer; it would be impossible, for instance, to go back to a short period of employment two or three years before the accident for the purpose of adding it to a short period immediately before the accident. That part of the clause I think means that, if the workman has not been in substantially the same consecutive employment for the twelve months preceding the accident, the calculation must be made upon the period of less than twelve months during which he has been in substantially the same consecutive employment. I attach considerable importance to the word "substantially," and agree with much that has fallen from Vaughan Williams L.J. in regard to that. For example, if there were holidays, that fact would not prevent the employment being substantially consecutive; and again, if there were no other employer to whom he could go, and the workman could not get immediate work from his employer, I should not let that fact weigh with me in determining whether the employment was substantially continuous. In the present case I have no hesitation in saying that the employment was not consecutive or continuous during the period for which the respondents contend; during the strike the appellant was in no sense in their employment.

Appeal allowed.

Solicitors for appellant: *Riddell, Vaizey & Smith, for Walter Morgan, Bruce & Co., Pontypridd.*

Solicitor for respondents: *W. Vazie Simons, Pontypridd.*

W. J. B.

C. A.
1899
April 29.

[IN THE COURT OF APPEAL.]

CHAMBERS *v.* WHITEHAVEN HARBOUR COMMISSIONERS.

Employer and Workman — Compensation — Employment on, in, or about Engineering Work—Workmen's Compensation Act, 1897 (60 & 61 *Vict.* c. 37), s. 7.

By s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, that Act applies (inter alia) to employment on, in, or about an engineering work; and by s. 7, sub-s. 2, "engineering work" is defined to mean any work of construction or alteration or repair of (inter alia) a harbour.

A harbour was being dredged by a steam dredger belonging to the harbour commissioners, the mud being discharged from the dredger into hoppers which, when full, were taken by a tug out to sea and there emptied, the workmen employed by the commissioners on the dredger going on the hoppers for that purpose. One of the workmen so employed by the commissioners on the dredger went in his turn on a hopper full of mud to sea to help in discharging it, and when about a mile and a half out at sea was knocked overboard owing to the swell and drowned:—

Held, that at the time of the accident the workman was not employed on, in, or about an engineering work within the meaning of s. 7 of the Act.

Appeal from a decision of the judge of the Whitehaven County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The application for compensation was made by the appellant, the widow of a workman who was killed while in the employment of the respondents. It appeared that dredging operations were being conducted by the respondents in the harbour at Whitehaven by means of a dredger and hoppers, and that the deceased man was employed by them upon the work. His duty was to do work generally on board the dredger, and to go about two miles out to sea on the hoppers, when full, in order to empty the mud from the hoppers in deep water. On the morning of the accident the deceased and a fellow-workman had discharged a hopper at sea, and then came back to the harbour and worked on the dredger, which was moored to the quay. When the hopper was again loaded it was taken to sea as usual by a steam-tug, the deceased and his fellow-workman

being on the hopper. There was a little swell on, and, while the deceased was standing on two planks across the well of the hopper ready to knock out the bolts to open the doors in the well, he was knocked by the handle of the windlass into the well and went down with the mud into the sea and was drowned. The county court judge held that at the time of the accident the deceased was employed as a seaman, and was also of opinion that he was not employed on, in, or about an engineering work or factory, and that, consequently, the applicant was not entitled to compensation under the Act. The applicant appealed.

T. Shepherd Little, for the appellant. The county court judge was wrong. The steam-dredging operations upon which the deceased was employed were engineering work, and he was employed on, in, or about engineering work within the meaning of s. 7, sub-s. 1, of the Act. It is immaterial that the deceased was upon the hopper and not upon the dredger at the time of the accident, for the whole of what was being done must be regarded as one operation necessary for the cleansing of the harbour. The words "engineering work" do not, like the other words used in s. 7, import the idea of locality; it is the work upon which the workman is employed, and not the locality at which he is employed, which must in such a case be looked at.

[He was stopped by the Court.]

Ruegg, Q.C., and *Arthur Powell*, for the respondents. The deceased was not employed on, in, or about an engineering work within the meaning of s. 7. Even if the work actually done on the dredger could be considered as included in that term, the mere carrying away of refuse in a hopper cannot be described as engineering work, although it may be a necessary part of the operations that the refuse should be carried away; if it were taken away in a cart instead of a hopper, it could not be contended that an accident happening when the cart was a mile and a half away would be within the Act. The definition of "engineering work" in s. 7, sub-s. 2, indicates clearly that the accident must happen in a definite locality in which the

C. A. 1899

CHAMBERS v. WHITEHAVEN HARBOUR COMMISSIONERS.

engineering work is being carried on. Here the accident happened a mile and a half away from the locality, and the decision in *Lowth* v. *Ibbotson* (1) is conclusive of the present case.

T. Shepherd Little, in reply. The deceased was employed on part of the plant used in the engineering work, and was therefore employed on, in, or about an engineering work. Further, he was employed on, in, or about a factory, for the word includes the machinery and plant in the factory, and if a portion of the plant is taken out of the factory for the purpose of the work that is being carried on, it does not cease to be a factory within the meaning of the Act.

A. L. SMITH L.J. I am of opinion that the decision of the county court judge was right, though not upon the ground that the deceased was employed as a seaman at the time of the accident. The short facts are that in this harbour there was a dredger worked by steam, and used for the purpose of dredging the mud from the bottom and keeping the harbour in a fit state to receive vessels coming in. The deceased was employed to a certain extent on the dredger, but when a hopper had been loaded with the mud it was his duty (in turn with others) to take the hopper out to sea and let out the mud; on the present occasion the hopper was about a mile and a half out at sea, and the deceased was letting out the mud, when the accident happened; the question for us is whether, at the time of his death, he was employed on, in, or about an engineering work within the meaning of the Act. Now s. 7 says, "This Act shall apply only to employment by the undertakers as hereinafter defined on, in, or about a railway, factory, mine, quarry"; stopping there, the meaning is that at the time of the accident the workman must be employed about one of those specified localities; the locality of the accident must be within the purview of the section. Then the section proceeds, "or engineering work"; and as regards this expression I was at one time not sure whether it pointed to a locality or to work wherever going on; I think, however, upon consideration that it points

(1) [1899] 1 Q. B. 1003.

to locality. This view is strengthened when we come to the definition in sub-s. 2 of "engineering work," which is defined as meaning "any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer," all of which expressions point to a definite locality. Therefore, in order to bring a particular case within the purview of the Act, the employment must be on, in, or about the named locality at the time of the accident.

Two cases have already been before this Court in which the point that arose was much the same as in the present case. In *Powell* v. *Brown* (1) a man in the employment of the owner of a factory was loading timber into his employer's cart in the street just outside the entrance to the factory when he received an injury which caused his death; and the question which arose was whether his employment was on, in, or about a factory within the meaning of this section. We held that it was, because the word "about" was an enlarging word, and, as the Legislature had not confined the Act to employment in or on a factory, the language of the section would be satisfied if the employment were in close proximity to it. Then came the case of *Lowth* v. *Ibbotson* (2), where a carter in the employment of a miller, whose mill was a factory within the Act, was injured while delivering sacks of flour at a distance of a mile and a half from the mill. The county court judge held that at the time of the accident the carter's employment was not on, in, or about a factory; in other words, that the expression "about" a factory could not cover something which happened a mile and a half off, and we upheld his decision. How do the facts stand in the present case? The man was not killed on the dredger; if he had been, I incline to think that he would have been within the Act, but I do not decide it; he was killed while employed on the hopper, which was in a similar position to the cart in the cases cited. Was he then at that time employed on an engineering work which was going on in, on, or about the dredger? I am clearly of opinion that he was not. If the mud had been taken away by a cart instead of by a hopper, the case would have been precisely the same as

(1) [1899] 1 Q. B. 157. (2) [1899] 1 Q. B. 1003.

C. A. 1899

CHAMBERS v. WHITEHAVEN HARBOUR COMMISSIONERS.

Lowth v. *Ibbotson*. (1) I express no opinion as to whether what was being done comes within the phrase "construction, alteration, or repair of a harbour"; I decide the case entirely on the ground that the employment of the deceased was not on, in, or about a locality named in the Act.

VAUGHAN WILLIAMS and ROMER L.JJ. agreed.

Appeal dismissed.

Solicitors for appellant: *Helder, Roberts, & Walton, for Atter, Whitehaven.*

Solicitors for respondents: *William Hurd & Son.*

C. A.

1899

April 15, 22.

[IN THE COURT OF APPEAL.]

HALL *v.* SNOWDEN, HUBBARD & CO.

Employer and Workman—Compensation—Employment on, in, or about a Factory—Wharf—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A wharf at the side of a canal, on which no machinery is used, is not a factory within the meaning of s. 7 of the Workmen's Compensation Act, 1897, unless it is a wharf to which some provision of the Factory Acts is applied by the Factory and Workshop Act, 1895.

APPEAL from a decision of the judge of the Bloomsbury County Court, upon an application for compensation under the Workmen's Compensation Act, 1897, made by the present appellant, the son of a workman who was fatally injured while in the employment of the respondents.

The respondents were the occupiers of a wharf abutting on the Regent's Canal, which was used by them for the purpose of loading into lighters liquid mud and road sweepings. There was no machinery upon the wharf, which was described as being a yard, with balks of timber at the edge to prevent the carts from falling into the canal. At the time of the accident a firm of contractors named Read Brothers were laying water-pipes for the vestry between the canal and an electric lighting

(1) [1899] Q. B. 1003.

station, in doing which work they had to pass through the respondents' wharf. The respondents had entered into a contract with Read Brothers to carry away the soil thrown up by the latter in laying the water-pipes. The deceased was a carter in the employment of the respondents, and on October 31, 1898, he had loaded a cart with soil upon the wharf, and was leading the horse and cart out of the entrance to the wharf into the street; he was walking backwards, and just after he had got into the street the horse and cart were met by a trolley laden with water-pipes coming to the wharf; the deceased did not see the trolley, and was crushed between the shaft of his cart and the laden trolley, receiving injuries from which he died. The county court judge held that the deceased had met with his death by an accident arising out of and in the course of his employment, but that the wharf was not a factory within the meaning of s. 7 of the Workmen's Compensation Act, 1897 (1), and therefore made his award in favour of the respondents. The applicant appealed.

Cripps, Q.C., and *Bailhache*, for the appellant. The wharf was a "factory" within the definition of that word in s. 7, sub-s. 2, of the Act, for it is a wharf to which certain of the provisions of the Factory Acts are applied by the Factory and Workshop Act, 1895, some of those provisions being applicable to all wharves, whether they have machinery or plant upon them or not. By s. 23 of the Act of 1895 (2) certain specified

(1) By 60 & 61 Vict. c. 37 (The Workmen's Compensation Act, 1897), s. 7, sub-s. 1, "This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a . . . . factory . . . ."

By sub-s. 2, "'Factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895 . . . ."

(2) By 58 & 59 Vict. c. 37 (The Factory and Workshop Act, 1895), s. 23, "The following provisions, viz.:

"(i.) Sect. 82 of the principal Act;

"(ii.) The provisions of the Factory Acts with respect to accidents;

"(iii.) Sect. 68 of the principal Act with respect to the powers of inspectors;

"(iv.) Sects. 8–12 of the Act of 1891 with respect to special rules for dangerous employments; and

"(v.) The provisions of this Act with respect to the power to

C. A. 1899

HALL v. SNOWDEN, HUBBARD & Co.

provisions of the Factory Acts, divided into five classes, are to have effect as if every wharf were a factory; the first, fourth, and fifth of these classes seem not to be applicable to the wharf in this case, but the second and third classes, being the provisions of the Factory Acts as to notice of accidents (now contained in s. 18 of the Act of 1895) and the provisions of s. 68 of the Factory Act, 1878, as to the powers of inspectors, are applicable to any description of wharf, whether it has upon it dangerous machinery or not. Moreover, on the true construction of the definition of the word "factory" in s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, the words "to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895," qualify only the words "machinery or plant" which immediately precede them, and "factory" includes any dock, wharf, quay, or warehouse.

Bray, Q.C., and *Herbert Smith*, for the respondents. This wharf was not a factory within the meaning of the Workmen's Compensation Act, 1897, and the true construction of s. 7, sub-s. 2, does not bring every wharf, &c., within the definition of a factory; had the Legislature intended such a result it would have used clear and unmistakable language. The provisions as to notice of accidents contained in s. 18 of the Act of 1895 are not applicable to this wharf, for they only apply to

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make orders as to dangerous machines

shall have effect as if—

"(*a*) Every dock, wharf, quay and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process; and

"(*b*) Any premises on which machinery worked by steam, water, or other mechanical power, is temporarily used for the purpose of the construction of a building or any structural work in connection with a building, were included in the word 'factory,' and the purpose for which the machinery is used were a manufacturing process, and as if the person who by himself, his agents, or workmen temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises; and for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock, wharf, quay or warehouse, or of any premises within the same or forming part thereof, and the person so using any such machinery, shall be deemed to be the occupier of a factory."

accidents happening "in," not "on in or about," a factory; here the accident happened in the street after the deceased had left the wharf. Nor could the provisions as to inspection in s. 68 of the Act of 1878 apply to workmen whose duties merely brought them on to the wharf for a short time in the course of the day. Further, although the respondents were the occupiers of the wharf, the particular work that they had to do under their contract with the vestry had nothing to do with their occupation of it; the deceased was employed by them, not as occupiers of the wharf, but because they happened to have a contract with third persons.

Cripps, Q.C., in reply. The provisions of s. 18 of the Factory and Workshop Act, 1895, are applicable to this wharf; it is immaterial that the accident did not occur on the wharf itself. The happening of an accident on a wharf is not the test to apply to see whether it is within the Factory Acts. The only question is whether any of the provisions of Factory Acts specified in the Factory and Workshop Act, 1895, are capable of being applied; if they are, the case is brought within the Workmen's Compensation Act, 1897, and, the accident having happened in immediate proximity to the "factory," the case falls within *Powell* v. *Brown* (1), and the appellant is entitled to succeed.

A. L. SMITH L.J. I am of opinion that the decision of the county court judge that this wharf was not a factory within the meaning of the Workmen's Compensation Act, 1897, was right, and that this appeal should be dismissed. The deceased was a carter in the employment of the respondents, who were the occupiers of a wharf bordering on a canal, which they utilized for the purpose of loading and unloading barges. The accident did not happen on the wharf, but just outside it, when the deceased had got into the public street; and if the question for us had been whether at that time the employment of the deceased had been "on in or about" the wharf, I should have held that it was in such immediate proximity as to be "about" the wharf, following our decision in *Powell* v. *Brown* (1); we

(1) [1899] 1 Q. B. 157.

C. A. 1899

HALL v. SNOWDEN, HUBBARD & CO.

A. L. Smith L.J

have not, however, to determine that question to-day. The point taken on behalf of the respondents—that the employment of the deceased was not an employment by them as occupiers of the wharf—I desire to leave open. The real question for us is whether the deceased, assuming that he had been killed on the wharf, would have come within the category of employment on, in, or about a factory within the meaning of s. 7 of this Act. By sub-s. 1 of that section, the Act is to apply only to employment by the undertakers on, in, or about a railway, factory, mine, quarry, or engineering work, and if the enactment stopped there, no difficulty would arise. But sub-s. 2 defines "factory," which "has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895." A point has been taken as to the application of the words "to which any provision," &c., but I am clearly of opinion that they apply to and limit the whole budget of words preceding them, and do not apply merely to the words "machinery or plant." I think that in order to get a wharf, which per se is not a factory, within the term "factory," it must be shewn that some of the provisions of the Factory Acts are applicable; for instance, if any orders made under the Factory Acts were applicable to the locus in quo, that is, to the wharf, it would be brought within the term "factory" as used in this Act; if, therefore, any orders made under the Factory Acts on such matters as inspection, notice of accidents, &c., were applicable to a particular wharf, it might be said to be brought within the Factory Acts and within the Workmen's Compensation Act.

Two such provisions are said to be applicable to this wharf. First, it is said that the provisions of s. 18 of the Factory and Workshop Act, 1895, as to notices of accident, apply; but the answer to that suggestion has, I think, been pointed out in the argument; under that section it is only when the accident occurs "in" a factory or workshop that notice has to be given; the section, therefore, cannot be made applicable in the present case because no accident occurred on the wharf—that is, in a

factory; and so this wharf cannot be brought in that way within the term "factory" as used in this Act. Then it is said that the provisions of s. 68 of the Factory and Workshop Act, 1878, as to the powers of inspectors were applicable to this wharf, and that it could be inspected under that Act. But no evidence was given that any persons were employed on this wharf in such a manner as to bring it within that section. Looking at the provisions of that section, I do not think that an inspector would have had any authority under it to enter upon the wharf for the purpose of exercising his powers of inspection and inquiry: the language of the various sub-sections of s. 68 seems to shew it to be wholly inapplicable. For these reasons I am of opinion that this appeal must be dismissed.

COLLINS L.J. I am of the same opinion, and entirely concur in all that has fallen from my Lord. I will only add that it is obvious that the Legislature must have intended in the definition clause in s. 7, sub-s. 2, to put some limitation on the word "wharf"; for instead of saying plainly that a factory means (inter alia) a wharf, they say that it has the same meaning as in the Factory Acts, and that it also includes, not "any wharf" simply, but "any wharf to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895." I do not say that the construction contended for on behalf of the appellant is not a possible construction; but, having to choose between two constructions, I think that the one which we have chosen is the more intelligible. We must, I think, place a limited construction on s. 18 of the Act of 1895; the provisions of that section can only apply to a wharf when an accident has occurred on the wharf, which may then become a factory for the purposes of that section; but that was not the case here, and that section is inapplicable.

VAUGHAN WILLIAMS L.J. I entirely concur.

Appeal dismissed.

Solicitors for appellant: *Riddell, Vaizey & Smith.*
Solicitors for respondents: *Marshall & Pridham.*

W. J. B.

C. A.
1899
May 6.

[IN THE COURT OF APPEAL.]

FLOWERS *v.* CHAMBERS.

Employer and Workman—Compensation—Ship Unloading in Dock—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A workman employed on board a ship lying in dock is not employed on, in, or about a dock, and is therefore not employed on or in or about a factory within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, whether the dock itself is a factory within the meaning of sub-s. 2 of that section or not.

APPEAL from a decision of the judge of the Bow County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The respondent, a labourer, applied for compensation in respect of an injury received while in the employment of the appellants, a firm of barge owners, who contracted for the discharge of manure and refuse from cattle steamers into barges supplied by them. On December 1, 1898, the appellants were about to discharge manure, &c., from the steamship *Savannah*, which was moored alongside a quay in the Victoria Docks. The respondent was on board the steamer, and while engaged about 7 P.M. in mooring a barge to it, fell from the upper to the lower deck of the steamer and was injured. The ship was being discharged by hand labour only, and neither the machinery of the dock nor of the ship was used for the purpose of unloading the manure into the barges. The county court judge held that the dock was a factory within the meaning of s. 7 of the Workmen's Compensation Act, 1897, and that as the respondent was working on a barge in the dock his employment was in a factory within the meaning of that section; he accordingly awarded compensation to the respondent. The employers appealed.

J. D. Crawford, for the appellants. The present case is concluded by the decision in *Hall* v. *Snowden, Hubbard &*

Co. (1), where it was held that a wharf was not a factory within the meaning of s. 7 of the Act, unless it was one to which some of the provisions of the Factory Acts applied, and that a wharf in which there was no machinery was not a factory within that section. Here the dock machinery was not being used in discharging the ship, and for the purpose of such discharge the dock was not a factory. It cannot have been intended that a man should be considered as working in, on, or about a factory when working on a ship in dock, when he would not be so considered if he were working on the same ship in the river just outside the dock gates.

[He was stopped by the Court.]

Candy, Q.C. (*W. A. Pocock* with him), for the respondent. A ship in a dock comes within the term "dock" as used in s. 7 of the Act of 1897; the question was raised, but reserved, in *Woodham* v. *Atlantic Transport Co.* (2) Further, the dock is a factory within the meaning of s. 7; it was capable of being treated as a factory, for it had machinery upon it, and it does not cease to be a factory because in a particular case the machinery is not resorted to, but manual labour only is employed.

A. L. SMITH L.J. I am of opinion that this appeal must be allowed. We are faced with the question which was raised, but not decided, in *Woodham* v. *Atlantic Transport Co.* (2), one of the earliest appeals under this Act which came before us; we are asked to say that a man employed on a ship in a dock is employed on, in, or about a dock within the meaning of s. 7 of the Act of 1897. If the Legislature had intended that ships should be brought within the purview of the Act, it would have been perfectly simple to have put the word "ship" in the section; they have, however, chosen words expressive of certain localities to which the application of the Act is limited, and a ship is not one of them. We are in effect asked to hold, and if we decide in the respondent's favour we must hold, that a ship is a dock, and against such a holding I must emphatically

(1) Ante, p. 136. (2) [1899] 1 Q. B. 15.

C. A. 1899

FLOWERS v. CHAMBERS.

A. L. Smith L.J.

protest. The argument in favour of the respondent is based upon the contention that by s. 7, sub-s. 1, the Act is to apply to employment on, in, or about a factory, and that in sub-s. 2 (*a*) "factory" is defined as including any dock to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895; it is contended, therefore, that this dock is a factory within the meaning of the Workmen's Compensation Act, 1897, and that the respondent was employed on, in, or about a factory, and was, therefore, within the purview of the Act. I do not agree with that contention. The question for our decision is not whether this dock was a factory within the meaning of the Act, and I do not decide that point; the only question for us is whether a man employed on a ship lying in a dock is employed on, in, or about a dock within the meaning of this Act. I think that he is not, and that this appeal must be allowed.

VAUGHAN WILLIAMS and ROMER L.JJ. agreed.

Appeal allowed.

Solicitors for appellants: *Keene, Marsland, Bryden & Besant.*
Solicitor for respondent: *S. Benham.*

W. J. B.

In re CALVERT.
Ex parte CALVERT.

1899
May 4.

Bankruptcy—Scheme of Arrangement—Proof for Assessed Taxes—Power of Court to go behind Assessment—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 111, 113, 118—*Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *s.* 57—*Board of Trade Regulations, May*, 1888.

The rule that on a proof for a judgment debt the Court will go behind the judgment and ascertain whether there is a provable debt, does not apply to a proof for assessed taxes.

Where therefore a debtor, who had carried in a scheme of arrangement, applied to expunge a proof for an assessment to income tax under Sched. D (which had not been appealed against), on the ground that he had made no profits assessable to duty, the application was dismissed, but without prejudice to any application he might be advised to make to the Inland Revenue under the Board of Trade Regulations of May, 1888.

THIS was a motion by the debtor, who had lodged a scheme of arrangement, to expunge a proof against his estate under these circumstances.

In May and July, 1897, the usual applications were served upon him for a return of his profits under Sched. D for the year ending April 5, 1898; but he made no return.

In October, 1897, the assessor of taxes made an assessment upon him under Sched. D for the year 1897–1898 on 10,000*l.*, and the usual notice was served upon him that the duty had been assessed at 333*l.* 6*s.* 8*d.* He did not appeal against this assessment, or make any objection.

Subsequently a receiving order was made against him, and a proof was lodged by the collector of taxes, on behalf of the Inland Revenue, for the 333*l.* 6*s.* 8*d.* as a preferential debt. He afterwards carried in a scheme for the payment of a certain composition on the debts which he admitted; and obtained the leave of the Court to serve notices of motion to expunge the proofs which he disputed. Amongst the disputed proofs was the one now in question. In support of his application the debtor filed an affidavit in which he stated that he had made no profits for the year ending April 5, 1898; and that, taking the average for the three years ending with that date, he had made no profits assessable to duty.

1899

CALVERT, *In re.* CALVERT, *Ex parte.*

Reed, Q.C., and *Carrington*, for the debtor. This proof if admitted will be a preferential debt, and will seriously diminish the dividends for the other creditors. The question is, is it a provable debt? An assessment for taxes is not proof of a debt, and stands on no higher footing than a proof for a judgment debt. The Court can always go behind a judgment and ascertain whether or not there is a real debt: *In re Lopes* (1); *In re Lennox* (2); *In re Hawkins* (3); *In re Fraser* (4); *Ex parte Kibble.* (5) The same rule, it is submitted, is applicable to an assessment for taxes, although there is no authority on the point. It is not a question between the debtor and a particular creditor, but between the particular creditor and the general body of creditors.

Danckwerts, for the respondents. A judgment debt and an assessment for taxes are not on the same footing. The reason of the rule that the Court will go behind a judgment to see if there is a real debt, is to prevent fraudulent or collusive judgments: *In re Lennox* (2); *Ex parte Kibble* (5); *In re Tollemache.* (6) But such a principle does not apply to an assessment for taxes. The taxes are assessed and levied under the enactments of the Income Tax Act, 1842, particularly ss. 111, 113, and 118; and a right of appeal is given by s. 57 of the Taxes Management Act, 1880.

[He was stopped.]

Reed, Q.C., in reply. A fraudulent debtor might make an extravagant return under Sched. D on purpose to defeat his creditors. At any rate, the debtor should have an opportunity of applying to the Inland Revenue under the Board of Trade Regulations of May, 1888. (7)

(1) (1889) 6 Mor. 245.
(2) (1885) 16 Q. B. D. 315.
(3) [1895] 1 Q. B. 404.
(4) [1892] 2 Q. B. 633.
(5) (1875) L. R. 10 Ch. 373.
(6) (1884) 13 Q. B. D. 720.
(7) By the Board of Trade Regulations under the Bankruptcy Act, 1883, of May, 1888 (No. 5), it is provided that "where income tax is outstanding under Schedule . . . . D the Inland Revenue authorities will, on receipt of an affidavit by the debtor, with a certificate by the official receiver or trustee setting out that the debtor has made no income taxable under such schedule, forego all claim to payment of the tax, whether the same is payable in full under s. 40 of the Bankruptcy Act, 1883, or otherwise. . . ."

WRIGHT J. It seems to me that this assessment is not like a judgment, nor within the principle which is applied to judgments. It is absolutely necessary in order to prevent fraudulent proofs and fraudulent bankruptcies to adopt the rule that judgments should not of themselves be conclusive. That rule appears to be founded on necessity. Here there is no such necessity. It is quite inconceivable that a man should act in the way that is suggested he might act in order to spite his creditors. But if he did, I am not sure that the bankruptcy law is not strong enough to reach the case within certain limits of time—possibly as a fraudulent preference of the Crown. If not within those limits of time, I should think very likely on common law principles it might be possible for the Court to deal with the matter. In the case of an assessment there is no question of consideration as there is in the case of a judgment: there is a mere administrative assessment with a special mode of appeal provided which must be followed. I cannot think it possible that it is competent to the Bankruptcy Court, on the invitation of the trustee in bankruptcy or of the debtor, to reopen questions of that kind on a motion to expunge. It is quite impossible to conceive that it would be competent for me sitting here to go into the question of the rateable values of a union or of a parish, or any question of that sort. That seems to me to be a case which is analogous to the case in which I am at present invited to act. I think the application fails and must be dismissed with costs; but my decision will not interfere with any application the debtor may be advised to make to the Inland Revenue under the Board of Trade Regulations of May, 1888.

Solicitors for debtor: *Poole & Robinson.*
Solicitor for respondents: *The Solicitor of Inland Revenue.*

H. L. F.

C. A.
1899
June 21.

[IN THE COURT OF APPEAL.]

GOOCH *v.* CLUTTERBUCK AND ANOTHER. DAVIS (THIRD PARTY).

Landlord and Tenant—Lease—Covenant to Repair—Mesne Assignment—Covenant by Assignee to indemnify Assignor—Breach of Covenant before Assignment.

A lease, the reversion on which was vested in the plaintiff, contained a covenant by the lessee to repair and keep in repair the demised premises. By virtue of divers mesne assignments and other acts in the law the term had become vested in the defendants, the executors of a deceased assignee of the lease. They, "as trustees," assigned the premises, which were then out of repair, for the residue of the term to an assignee, who covenanted with them thenceforth to pay the rent reserved by the lease, and perform the lessee's covenants therein contained, and to keep them indemnified from the payment and performance thereof respectively. The premises remaining out of repair, the plaintiff subsequently brought an action against the defendants for breach of the covenant to repair, and they brought in their assignee as third party. The plaintiff having recovered damages against the defendants in the action:—

Held, that the third party was liable under his covenant to indemnify them against those damages.

APPEAL as after mentioned from the judgment of Channell J. at the trial without a jury.

The action was for breach of a covenant to repair contained in a lease by the reversioner against assignees of the term. By an indenture of lease dated August 4, 1807, Sir Thomas Gooch demised a piece of land to Samuel Critchley for a term of 100 years from March 25, 1807, at the yearly rent of 3*l*. 15*s*. The lease contained covenants by the lessee to build one or more dwelling-houses on the land demised as therein provided, and from time to time, and at all times during the continuance of the demise, as often as need should be, well and sufficiently to repair the same, and keep the same in good, complete, sufficient, and substantial order and repair. In pursuance of the covenant contained in the lease two dwelling-houses were erected on the land demised. The plaintiff was the owner of the reversion expectant upon the

determination of the term granted by the lease. By virtue of divers mesne assignments and other acts in the law, the demised premises became vested for the residue of the term in one John Malin, and, upon his decease, the defendants, who were his executors, had entered into possession of the demised premises. John Malin and the defendants had neglected to perform the covenant to keep the premises in repair. On October 1, 1897, the plaintiff served upon the defendants a notice to repair with particulars of dilapidations under the Conveyancing Act, 1881. On the same day the defendants entered into an agreement for the sale of the residue of the term to Patrick Davis. On December 20, 1897, the purchase was completed, and the lease was assigned by the defendants to Davis. By the assignment, for the consideration therein mentioned, the defendants, as trustees, conveyed and assigned the premises to Davis for the residue of the term granted by the lease "at the yearly rent of 3*l.* 15*s.* by the said lease reserved, and subject to the lessee's covenants therein contained," and Davis covenanted as follows: "The purchaser doth hereby covenant with the vendors that he will henceforth pay the rent by the said lease reserved, and observe and perform the lessee's covenants therein contained, and from the payment and performance thereof respectively will keep indemnified the vendors, and the estate and effects of the said John Malin deceased." Before the completion of the purchase the purchaser's solicitor was informed by the answers to requisitions on title that the landlord had given the above-mentioned notice as to repairs. The premises remaining out of repair, on January 31, 1898, the plaintiff brought the action for breach of the covenant to repair against the defendants. The defendants obtained an order to bring in Davis as third party, and that he should appear at the trial and take such part therein as the judge at the trial might direct. At the trial the learned judge found that there had been a breach by the defendants of the covenant to repair, and gave judgment for the plaintiff against them for damages to be ascertained by a reference, and that the defendants should recover from the third party the amount of the damages so found to be due and all costs incurred by them.

C. A. 1899

GOOCH v. CLUTTERBUCK.

The third party appealed against this judgment so far as it concerned himself.

O. Leigh Clare, for the third party. The damages which were recovered against the defendants in the action could only be for breach of the covenant to repair before the assignment to the third party, for the defendants, as assignees of the term, could only be liable to the reversioner for breaches of the covenant to repair which occurred during the time that they were assignees. Upon the true construction of the covenant by the third party contained in the deed of assignment to him, it only relates to the performance of the covenants of the lease in futuro, subsequently to the assignment. It is submitted that there is no indemnity between the parties one way or the other with regard to the breach of covenant which existed before the assignment; and, the landlord having elected to sue the defendants for that breach, instead of proceeding against the third party for the continuing breach, the burden must lie where it has fallen. If the defendants had assigned as "beneficial owners" there would have been an implied covenant by them against breaches of covenant previously to the assignment; but they only assigned as trustees. On the other hand it is contended that there is no undertaking by the third party to indemnify the defendants against their breaches of covenant before the assignment. Apart from any express covenant, the primary liability for breaches of the covenant to repair prior to the assignment to the third party would rest upon the defendants, and the liability for breaches of covenant subsequent to the assignment would rest on the third party. It is submitted that the terms of the covenant by the third party cannot import that he is to be responsible for breaches of covenant which occurred before his time. A covenant of this kind is a common form in assignments of leases, and such a covenant ought not to be construed as making the assignee by mesne assignment liable for breaches of covenant occurring before his time, any more than as making him liable for rent in arrear at the time of the assignment to him. If such a liability were intended, it should have been

provided for in express terms. [He cited *Smith* v. *Peat* (1); *Hawkins* v. *Sherman*. (2)]

A. T. Lawrence, Q.C., and *T. Douglas* (*Stubbins* with them), for the defendants. Having regard to the circumstances in reference to which the covenant in question, which is not in the ordinary form, was made, the reasonable construction of it is that it makes the third party liable to indemnify the defendants against the breach of the covenant to repair which existed prior to the assignment to the third party. The defendants were selling as executors old premises, and the fact that they were out of repair was known to the third party when he took the assignment of them. He was buying them in view of the state in which they were, and with notice that there had been a notice to repair by the landlord. It is submitted that, having regard to the position of the parties, the natural and reasonable construction of the covenant is that the third party thereby undertook to perform the covenant to repair, and indemnify the defendants against the existing breach of it. The appellant's contention makes the covenant of no effect, because the defendants would not be liable for breaches of the lessee's covenants after they had assigned. The defendants were parting with the possession of the premises, and could not after the assignment do the repairs for which they were responsible, themselves, and it was reasonable that it should be made a term of the assignment that the assignee should thenceforth do them, and indemnify the defendants against the consequences of non-repair. If the third party had performed his covenant thenceforth to perform the lessee's covenant, i.e. had repaired the premises, the defendants would never have been sued by the landlord, or at most the landlord could only have recovered nominal damages. Therefore, the damages incurred by the defendants are the result of the third party's breach of his covenant thenceforth to perform the lessee's covenant to repair.

O. Leigh Clare, in reply.

A. L. SMITH L.J. This is an appeal from the judgment of Channell J., who held that the defendants in the action were

(1) (1853) 9 Ex. 161. (2) (1828) 3 C. & P. 459.

C. A. 1899

GOOCH v. CLUTTERBUCK.

A. L. Smith L.J.

entitled to be indemnified by the third party. The learned judge expressed some doubt as to the true construction of the covenant in question, and I cannot say that I think it absolutely clear; but I am not prepared to differ from the conclusion at which he arrived. The question is whether, upon the true construction of the covenant entered into by the third party, he is bound to indemnify the defendants against the damages for the breach of the covenant to repair for which judgment has been given in the action against them. The covenant entered into by the third party is in the following terms: "The purchaser doth hereby covenant with the vendors that he will henceforth pay the rent by the said lease reserved, and observe and perform the lessee's covenants therein contained, and from the payment and performance thereof respectively will keep indemnified the vendors." What is the meaning of this covenant? We have been told the circumstances under which it was entered into. The defendants, as executors, were selling to the third party old premises, which were at the time of the sale out of repair, and the purchaser knew that the covenant to repair was then broken. In view of those circumstances the purchaser undertakes thenceforth to observe and perform the lessee's covenants, and also to keep the vendors indemnified from the performance of them. There is no limitation in the words of that covenant. I think the true construction of it is that the third party thereby undertook to indemnify the defendants against any liability to which under the covenant to repair they might then, i.e., at the time of the assignment as well as afterwards, be subject. The appeal must therefore be dismissed.

RIGBY L.J. I am of the same opinion. I do not think the meaning of the covenant upon which this case depends very clear; but on the whole I agree with the construction which Channell J. put upon it. Both parties to the assignment knew the condition of the premises and the terms of the lease. The third party, when he took the assignment, knew that the covenant to repair contained in the lease had not been performed by his assignors, and under those circumstances he enters into

a covenant that he will "henceforth pay the rent by the said lease reserved, and observe and perform the lessee's covenants therein contained." If he had done so, and put the premises into proper repair, no action would have been brought against the defendants. The covenant goes on to provide that the purchaser "from the payment and performance thereof respectively will keep indemnified the vendors." The meaning of the covenant by the third party seems to me to be: "I know that you have not performed the covenant to repair, and I will indemnify you from performance of it." It does not appear to me unreasonable that he should do so, for one may well assume that, in consequence of the necessity for putting the premises into repair, he gave less for the property than he otherwise would have done. Indemnifying a person from performance of a covenant means indemnifying him against any expenses which may be thrown upon him by reason of the obligation which he has undertaken. The obligation to repair these premises had been undertaken by the defendants and not performed by them, and in consequence they were sued by the landlord for breach of covenant and judgment for damages was recovered against them. It appears to me that upon the true construction of the covenant in question they are entitled to be indemnified by the third party against those damages.

VAUGHAN WILLIAMS L.J. I agree. I think that the reasonable construction of this covenant is that the third party thereby undertook to satisfy any claim which the landlord might have in respect of the lessee's covenant to repair. I come to that conclusion partly on account of the peculiar wording of the covenant, which is to keep the vendors indemnified "from performance" of the lessee's covenants, instead of "from actions for non-performance" of them, which is the more ordinary expression. It seems to me that the meaning of the words used is that the purchaser will save the vendors from any obligation in respect of the lessee's covenant. I am also led to the same conclusion from the fact that the covenant for indemnity relates to an obligation which it would be impossible for the defendants themselves to perform. They were assigning

C. A. 1899 GOOCH v. CLUTTERBUCK.

the lease, and, after that assignment, they would have no right to enter on the premises to do that which might be necessary in order to satisfy the covenant to repair.

Appeal dismissed.

Solicitors for third party: *Goldberg, Barrett & Newall, for Arthur J. O'Connor, Birmingham.*

Solicitors for defendants: *Ward, Bowie & Co., for Lane, Clutterbuck & Tomlinson, Birmingham.*

E. L.

1899 *June* 8.

Ex parte FLINN & SONS.

Licensing Acts—Offences—Sale without Licence—Disqualification from holding Licence—Application by Owner for Authority to carry on Business—Jurisdiction to make Order—Licensing Acts, 1872, 1874 (35 & 36 *Vict. c.* 94, *s.* 3; 37 & 38 *Vict. c.* 49, *s.* 15).

By the Licensing Act, 1872, s. 3, no person shall sell by retail intoxicating liquor without being licensed, subject to penalties, for the first offence of 50*l.* or one month's imprisonment, for the second offence of 100*l.* or three months, and in the case of a second offence, "he may, by order of the Court by which he is tried, be disqualified for any term not exceeding five years from holding any licence for the sale of intoxicating liquors."

By the Licensing Act, 1874, s. 15, "Where any licensed person is convicted for the first time of" (inter alia) "selling spirits without a spirit licence, ... and in consequence either becomes personally disqualified or has his licence forfeited," the owner of the premises may apply for authority to carry on the business.

A licensed person was convicted, on the same day, of two separate offences, for selling spirits without a spirit licence on two different days, and on the second conviction was ordered to be disqualified from holding a licence. The owner applied for authority to carry on the business. The justices held that they had no jurisdiction to hear and determine the application.

On a case stated:—

Held, that the words, in s. 15 of the Act of 1874, "for the first time," govern the words "becomes personally disqualified or has his licence forfeited," as well as the words specifying the offences, and therefore the owner was entitled to apply, and the justices had jurisdiction to make an order.

CASE stated by justices for the borough of Saffron Walden.

An information was laid on February 13, 1899, against

1899

FLINN & SONS, *Ex parte.*

Walter Peachey of the Royal Oak beerhouse, Saffron Walden, for that he, on December 20, 1898, did unlawfully sell intoxicating liquor, to wit rum, which he was not then duly licensed to sell, contrary to the Licensing Act, 1872, s. 3. (1) On February 14, 1899, a second information was laid against him, for that he, on January 14, 1899, was guilty of a similar offence in selling whisky. On February 18, 1899, the two informations were heard separately. On the first information Peachey was convicted and fined 5*l.* On the second he was convicted, and was fined 25*l.*, and ordered to be disqualified for two years from holding any licence for the sale of intoxicating liquor. By the operation of s. 3 of the Licensing Act, 1872, Peachey thereupon forfeited his licence to sell beer. At a petty sessions held on February 25, 1899, an application was made on behalf of Flinn & Sons, the owners of the Royal Oak, for an authority, under the Licensing Act, 1874, s. 15, to carry on, until the next special sessions for licensing purposes, the

(1) By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3, "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorized by his licence to sell the same;" (and the section imposes penalties as follows:—)

"(1.) For the first offence he shall be liable to a penalty not exceeding 50*l.*, or to imprisonment, with or without hard labour, for a term not exceeding one month;

"(2.) For the second offence he shall be liable to a penalty not exceeding 100*l.*, or to imprisonment, with or without hard labour, for a term not exceeding three months, and he may, by order of the Court by which he is tried, be disqualified for any term not exceeding five years from holding any licence for the sale of intoxicating liquors;" and further penalties are imposed for third and subsequent offences. . . . "In addition to any other penalty imposed by this section, any person convicted of a second or any subsequent offence under this section shall, if he be the holder of a licence, forfeit such licence. . . ."

By the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 15, "Where any licensed person is convicted for the first time of any one of the following offences: . . . .

"(3.) Selling spirits without a spirit licence; . . . : and in consequence either becomes personally disqualified or has his licence forfeited, there may be made, by or on behalf of the owner of the premises, an application to a court of summary jurisdiction for authority to carry on the same business on the same premises until the next special sessions for licensing purposes, and a further application to such next special sessions for the grant of a licence in respect of such premises . . . ."

1899

FLINN & SONS, *Ex parte.*

business of beersellers on the premises. The justices found as a fact that prior to the application being made Peachey had been convicted for the second time of the offence of selling spirits without being duly licensed, and held that they had no jurisdiction to hear and determine the application under s. 15 of the Act of 1874, inasmuch as the opening words of that section limit the right to make the application to cases where a person is convicted for the first time, and that any application for a licence for the premises could only be entertained at the general annual licensing meeting for the borough.

The question for the opinion of the Court was, whether it was open to the justices to entertain the application on behalf of the owners to carry on the business.

Foote, Q.C. (*Hubert O. S. Evans* with him), for the appellants, the owners. The effect of s. 3 of the Licensing Act, 1872, is, that, in cases of sale of spirits without being duly licensed, no disqualification or forfeiture of licence attaches under that section until there has been a second conviction, whereas, in cases of the other offences referred to in s. 15 of the Licensing Act, 1874, the disqualification or forfeiture attaches on the first conviction. See, as to making internal communication between licensed and unlicensed premises, 35 & 36 Vict. c. 94, s. 9; as to forging a certificate, 32 & 33 Vict. c. 27, s. 11; and, as to felony, 3 & 4 Vict. c. 61, s. 7, 23 & 24 Vict. c. 27, s. 22, and 33 & 34 Vict. c. 29, s. 14. The true meaning of s. 15 is, that when the disqualification or forfeiture first arises by reason of conviction, then the right of the owner to apply for relief comes into existence. The section should be read as if the words were, "Where any licensed person for the first time is convicted, ... and in consequence either becomes personally disqualified, or has his licence forfeited," thus making the words "for the first time," govern the words relating to disqualification or forfeiture, as well as the words specifying the offences. The effect of the construction adopted by the justices would be to render it impossible that the owner could ever obtain relief under the section where there had been a conviction for selling spirits

without a spirit licence, and in effect to strike out of the section the words "selling spirits without a spirit licence," and so to limit the operation of the section to cases of the other three specified offences. This construction is unreasonable, and opposed to the manifest intention of the Legislature.

The justices did not appear.

DAY J. The only reasonable construction which can be put on this somewhat difficult section is that which has been contended for on behalf of the appellants. I am therefore of opinion that the justices had power to entertain the application which was made to them by the appellants, and the case must be remitted to them with this expression of our opinion.

LAWRANCE J. concurred.

Judgment for the appellants. Case remitted.

Solicitors for appellants: *Baker & Thorneycroft, Bishop's Stortford.*

P. B. H.

1899
May 10, 17.

ATTORNEY-GENERAL *v.* CARLTON BANK.

Revenue—Stamp—"Receipt"—Money received by Servant on account of Master and handed over to Fellow Servant—Acknowledgment of Receipt by Fellow Servant—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 101.

A solicitor was employed by a bank under an agreement whereby he was appointed an officer of the bank upon the terms that he was to be paid a salary, and to be provided with an office, stationery, and staff of clerks, and was to devote his whole time to the conduct of the legal business of the bank. The solicitor from time to time sued for and recovered sums of money due to the bank. As each sum was recovered he entered the amount in an account book, and then in accordance with his duty handed over the money to the secretary or cashier of the bank, who wrote against the entry in the account book his initials and the date on which the money was handed over to him, in some instances adding the word "received." The account book was the property of the solicitor and remained in his possession:—

Held, that as the initialling of the entries in the account book, whether with the addition of the word "received" or not, was intended as an acquittance of the solicitor in respect of the money handed over by him, the entries so initialled constituted "receipts" within s. 101 of the Stamp Act, 1891, and required to be stamped, none the less because the solicitor was a servant of the bank on whose behalf he had received the money, and the acknowledgment of the receipt of the money from him was given by a fellow-servant.

FURTHER CONSIDERATION before Lord Russell of Killowen C.J.

The defendants are a limited company carrying on the business principally of money lenders. By an agreement made on August 20, 1895, between the defendants and a solicitor of the name of G. S. Coxwell, the defendants appointed Coxwell to be an officer of the bank upon the terms that they were to pay him a salary and pay the rent and expenses of the office, and provide books of account and stationery and a staff of clerks, and that Coxwell, as solicitor to the bank, should take all necessary steps for the recovery of debts due to the bank, advise the directors, and generally conduct all the legal business of the bank. It further provided that he was to give his whole time to the business of the bank, subject to this, that when not

actually engaged on the business of the bank, he might with the permission of the bank take private practice, and that he was to be bound by the rules and standing orders of the bank.

It was the duty of Coxwell upon recovering any debt due to the bank to hand the money so recovered over to the secretary or the cashier of the bank. Coxwell kept his accounts of the debts recovered in two books, one of which was in continuation of the other, the first being entitled "Statement of moneys received by G. S. Coxwell from customers of the Carlton Bank and handed over to the bank," and the second being entitled "Cash received book." These books were his property. As each sum was recovered he entered the amount in one of these books, and the secretary or cashier on receiving the money from him in all cases wrote his initials in the book against the amount with the date of the receipt. In the case of eleven of these entries nothing beyond the initials and date was so written; in one case the word "entered" was added; and in the remainder, thirty-six in number, the word "received" was added. None of these entries were stamped with a receipt stamp. Proceedings were taken on behalf of the Crown against the defendants to recover a penalty in respect of each of these forty-eight initialled and unstamped entries, under s. 103 of the Stamp Act, 1891. (1) At the trial of the information, which took place before the Lord Chief Justice and a jury, in answer to a question whether the secretary and cashier in giving the receipts in question were acting as agents of the bank and within the ordinary scope of their authority as such agents, the

(1) Sect. 101, sub-s. 1 of the Stamp Act, 1891, provides that "For the purposes of this Act the expression 'receipt' includes any note memorandum or writing whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand of the amount of two pounds or upwards is acknowledged to have been settled satisfied or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person."

Sect. 103: "If any person—

"(1.) gives a receipt liable to duty and not duly stamped; . . . . he shall incur a fine of ten pounds."

1899

ATTORNEY-GENERAL v. CARLTON BANK.

jury found that they gave the receipts "as individuals to protect themselves against each other and not to protect the bank," and that they did so "in the ordinary course of business as between one servant and another." The Lord Chief Justice reserved the question whether the entries so initialled were "receipts" within the meaning of the Act, and it was agreed that he should have power to draw all inferences of fact not inconsistent with the findings of the jury.

Sir R. Finlay, *S.-G.*, and *Danckwerts*, for the Crown. First, the entries were receipts within the meaning of the Stamp Act, 1891, and required to be stamped. A document may be in fact a receipt although it does not purport to be a receipt upon the face of it; it is enough if there be evidence to show that the letters and figures were intended to signify a receipt: *Rex* v. *Hunter* (1); *Spawforth* v. *Alexander* (2); *Reg.* v. *Overton*. (3) Wherever a document acknowledges that money has been paid to the amount of 2*l.*, and is intended as a protection to the person who pays and is delivered to him, it requires a stamp. A mere memorandum of receipt which the party receiving the money keeps in his own possession for his own information would not be enough.

[LORD RUSSELL of KILLOWEN C.J. In respect of each of these sums to which the entries relate, was there not only one payment, namely, by the customer from whom the money was recovered, and one receipt, namely, by the bank? Were not the intermediate transfers mere machinery?]

No, the servant is indebted to his master for all the money he receives on the master's account; the relation between them is that of debtor and creditor. He is not bound to hand over the specific coins.

[LORD RUSSELL of KILLOWEN C.J. Are the multiform invoices used in large shops for the purpose of identifying the particular clerks through whose hands the money passes required to be separately stamped?]

No, for they are not intended as a discharge to the respective

(1) (1794) 2 Lea. 624. (2) (1798) 2 Esp. 621.
(3) (1854) 1 Dears. 308.

clerks and are not retained in their possession; they are intended merely to simplify the business of bookkeeping.

[They also referred to *Finney* v. *Tootel.* (1)]

Secondly, the receipts were given by the bank. Where a master authorises his servant in the course of business to give a receipt whether as between the master and the party paying, or as between the servant and the party paying, the master is liable under s. 103 if it is not stamped. The jury must be taken to have found that the bank authorised the giving of these receipts unstamped. The presumption that a master authorizes whatever the servant does in the course of his employment, though it may not extend to criminal acts properly so called, does extend to acts which are prohibited by statute under a penalty: *Attorney-General* v. *Siddon* (2); *Davies* v. *Harvey* (3); *Commissioners of Police* v. *Cartman* (4); *Advocate-General* v. *Grant.* (5) And see per Wright J. in *Sherras* v. *De Rutzen.* (6)

Arthur O'Connor, Q.C., and *W. Graham*, for the defendants. The initialled entries in Coxwell's book were not receipts within the meaning of the Act. They were intended only as memoranda and not as a discharge to Coxwell of his liability. Even in the cases in which the word "received" was added, the use of that term does not necessarily prove the contrary: *Carey* v. *Eccleston* (7); *Langdon* v. *Wilson.* (8) The Crown's contention leads to hardship. A Revenue Act ought to be construed liberally in favour of the subject.

Danckwerts, in reply.

Cur. adv. vult.

May 17. LORD RUSSELL of KILLOWEN C.J. This is a case in which the Crown by information seeks to recover a number of penalties against the defendants upon the ground that they were responsible for the issuing unstamped of certain receipts which required stamps. The defendants are a limited

(1) (1848) 17 L. J. (C.P.) 158.
(2) (1830) 1 C. & J. 220.
(3) (1874) L. R. 9 Q. B. 433.
(4) [1896] 1 Q. B. 655.
(5) (1853) 15 D. 980.
(6) [1895] 1 Q. B. 918, at p. 922.
(7) (1834) Crawf. & Dix. Ab. C. 6.
(8) (1828) 2 Man. & R. 10.

1899

ATTORNEY-GENERAL v. CARLTON BANK.

Lord Russell C.J.

company, carrying on apparently the business principally of a money-lending bank, and they had in their employment, under a special agreement, a person of the name of Coxwell. That agreement, which is dated August 20, 1895, purports to appoint Coxwell (therein called "the solicitor") to be an officer of the bank, the appointment to continue until determined by notice, as provided, by the bank, with a provision that in case of gross misconduct he is to cease to be an officer of the bank. It provides that the bank is to pay him a salary, and to pay the rent of his office, and cash for court fees and disbursements, and to provide all books of account and stationery; that the solicitor is to take the necessary steps to recover the debts due to the bank and to advise the bank; that he is to be paid certain travelling allowances while engaged in the business of the bank; and that the bank is to be entitled to his whole time, with a proviso that if it does not interfere with the business of the bank, he may, subject to their pleasure in the matter, attend to the business of other persons. The course of business between the solicitor so appointed an officer of the bank and the bank appears to have been this: When instructed he sued for and from time to time recovered amounts of money for the bank, and he seems to have kept his accounts with the bank in this form:— The accounts as produced are contained in two books, the first of which in order of date is headed "Statement of moneys received by G. S. Coxwell from customers of the Carlton Bank and handed over to the Bank." When he received money on account of the bank it was his duty to pay over that money to an officer of the bank, and that officer (sometimes the secretary, sometimes the cashier) having received the money, initialled the amount in the book and added a date evidencing the date on which he received it. Sometimes the form was varied by having the word "received" added, and in one case the word "entered" is used. So the matter goes on through the first book, and is carried on into the second book, which is a continuation of the first, and is entitled "Cash received book." The contention on the part of the Crown is that each of these records—to use a neutral phrase—of the reception of money by the officer of the bank to whom Coxwell

1899

ATTORNEY-GENERAL v. CARLTON BANK.

Lord Russell C.J.

handed it over, constituted a receipt within the meaning of the Act of 1891, and required a stamp where the amount so recorded or acknowledged as received amounted to 2*l.* or upwards. The only remaining fact which it is necessary to refer to is the finding of the jury in answer to the question whether the cashier and secretary in making these acknowledgments in Coxwell's books were acting for the bank in the ordinary scope of their authority as agents for the bank. The jury found that they "did it as individuals to protect themselves against each other and not to protect the bank," and that they did "it in the ordinary course of business as between one servant and another." It was agreed that I should have power to draw any inference of fact not inconsistent with the finding of the jury.

Upon this state of facts three questions seem to arise. First, are these entries or any of them receipts within the meaning of s. 101 of the Act of 1891? Secondly, if they are so, are the defendants, the bank, liable to the penalty fixed by s. 103? Thirdly, is there any distinction to be drawn between the different instances, or do they all fall within the same category? First. Are the entries or any of them receipts? That depends upon the true construction of the section, which provides that "'receipt' includes any . . . . writing whereby any money amounting to two pounds or upwards . . . . is acknowledged or expressed to have been received or deposited or paid, or whereby any debt . . . . or any part of a debt . . . . of the amount of two pounds or upwards is acknowledged to have been settled satisfied or discharged, or which signifies or imparts any such acknowledgment, and whether the same is or is not signed with the name of any person." Those words are of the widest and most comprehensive kind. It seems clear that the entries in question were intended to be, and were in fact acknowledgments by an officer of the bank, who had authority to receive money for the bank, that he had in fact received the money from the solicitor, and had received it for the bank. The entries when initialled by the officer of the bank constituted an acquittance pro tanto of the solicitor in respect of the money handed over by him. Can I then say that those entries

1899

ATTORNEY-GENERAL v. CARLTON BANK.

Lord Russell C.J.

are not receipts within the comprehensive definition which I have read? It seems to me that they are receipts within both branches of s. 101—that is to say, they are both writings acknowledging or expressing the receipt or payment of £2 or upwards, and also writings whereby a debt or part of a debt is acknowledged to have been paid. In the course of argument reference was made on both sides to supposed special canons of construction applicable to Revenue Acts. For my part I do not accept that suggestion. I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed. The Court must no doubt ascertain the subject matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like. Courts have to give effect to what the Legislature has said. If in this case Coxwell, instead of being in the service of the bank under a special agreement, had been employed upon the terms upon which solicitors usually are employed, it would have been indisputable that the entries in his books must have been stamped. Then is there anything in the circumstances of that case which in principle differentiates the present from it? No doubt an independent solicitor when once he had received money for the bank would be absolutely the debtor of the bank, and would be bound in all events to account for that money to the bank, and further he could not be treated as a servant of the bank so as to be liable to prosecution for embezzlement if he appropriated the money to his own use. In the present case probably—though it is not necessary to decide the point—Coxwell might be properly regarded as a servant of the bank, so as to be liable to be prosecuted for embezzlement

if he did not account for the money, and further he would not in my judgment be absolutely the debtor of the bank in the same sense as that in which the independent solicitor would be, for if after he had received the money for the bank it had been lost or stolen without any neglect on his part, it seems to me that he would not have been liable in respect of such loss. But those two differences do not distinguish the case in principle. I think upon consideration that the case which I suggested in the course of argument—that of the multiform invoices used by the clerks in large shops—is distinguishable from the present case, for this reason, that the entries in that case are intended merely for the regulation of bookkeeping, and are not regarded as documents of acquittance to the clerk who hands over the money, and are not retained by him. When the language of the Act is looked at it will be seen that the distinction I am here drawing is a real and not a technical one, for the words of the section are: "a writing whereby any money is acknowledged or expressed to have been received," that is acknowledged or expressed to somebody, and in the penalty section, s. 103, the words are: "If any person gives a receipt," that is, if he hands over a receipt as an acquittance or discharge to a particular person. Here it is clear that the receipt is given to Coxwell, and is kept by him as evidence of the payment. The headings of the books bear out that view, as also does the fact that the book, when initialled, is returned to him, and is not in the custody of the bank at all, except during the moment of initialling. I therefore come to the conclusion that these entries, or some of them, are receipts within the meaning of the Act, and require stamps.

The next question is, is the bank liable? Now it is clear that under s. 103 the person who is liable is the person who gives the receipt, and therefore, in order that the bank should be made liable, it must be shewn that the receipt was given by them. But they are a limited company, and their receipt can only be given by the officers of the bank acting within the scope of their authority as such officers. And the jury have found that the officers who received the money, the secretary and the cashier, had the authority of the bank to receive it,

1899

ATTORNEY-GENERAL v. CARLTON BANK.

Lord Russell C.J.

so that the reception of the money by them was in fact a reception by the bank. Then, having so received the money, they, in the ordinary course of business, gave these acknowledgments which I have already intimated were receipts within the meaning of the Act. It is true the jury went on to say that the motive with which the bank officials gave these receipts was to protect themselves against each other and not to protect the bank. But the question is not, what was their motive, but what, in fact, did they do. I do not think that the finding of the jury as to the motive with which the receipts were given precludes me from drawing the inference that the receipts were given with the knowledge and authority of the bank, and that they were consequently the bank's receipts. I am of opinion, therefore, that the bank is liable. The only remaining question is whether any distinction is to be drawn between the cases, or whether they all fall within the same category. In my judgment they all fall within the same category. The language of s. 101 makes it clear that no formal words are required. Any writing which signifies or imports an acknowledgment is enough. And it seems to me that all these entries import an acknowledgment whether they are merely initialled, or whether in addition to the initials they contain the words "entered" or "received." There must be judgment for the Crown.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor for Inland Revenue.*
Solicitor for defendants: *S. J. Debenham.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A. 1899 *June* 5.

Ex parte TWEED.

Practice—Solicitor—Charge for Costs—Property Recovered or Preserved—Property of Persons not Employing Solicitor—Probate Action—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

A testator by his will, after bequeathing his household furniture and effects to his wife, devised and bequeathed the residue of his real and personal estate to his wife for life, and, after her decease, to his two daughters, of whom one was his legitimate daughter by a former wife and the other was illegitimate, in equal shares. Probate of the will being opposed by the testator's daughters, the executor brought a probate action against them to establish its validity with the result that probate of the will was decreed. The bulk of the estate was realty :—

Held, that the solicitor who acted for the executor was entitled under the Solicitors Act, 1860, s. 28, to a charge for his costs in the action upon the property devised and bequeathed by the will as property preserved through his instrumentality.

APPEAL from an order of Grantham J. at chambers refusing an application as after mentioned.

Henry Gresham by his will dated July 1, 1895, appointed John Woods executor and trustee of his will, and, after bequeathing his household furniture and effects to his wife Grace Gresham, devised and bequeathed the residue of his real and personal estate to his said wife for life, and, after her decease, unto and between his two daughters Sarah Harrison and Barbara Bottomley in equal shares. The testator died on July 2, 1895. Grace Gresham, who was the testator's second wife, survived him. Barbara Bottomley was the testator's legitimate daughter by his first wife, the other daughter being illegitimate. The testator left a very small quantity of personal property, the bulk of the estate consisting of certain freehold cottages. The daughters entered a caveat against probate of the will. The executor Woods thereupon brought an action against them in the Probate, Divorce and Admiralty Division to establish the will. The case was tried before Grantham J. at Lincoln Assizes with the result that the validity of the will

C. A. 1899

TWEED, *Ex parte.*

was established, probate of the will was decreed, and judgment was given for the plaintiff for costs against the defendants. Mr. F. G. Tweed, who had acted as solicitor for the plaintiff in the probate action, was unable to obtain payment of his bill of costs therein from the plaintiff, and, there being no property of the defendants against which the judgment could be enforced by execution (1), he applied to Grantham J. for an order under the provisions of s. 28 of the Solicitors Act, 1860, declaring that he was entitled to a charge upon the real and personal estate devised and bequeathed by the will of Henry Gresham, as property recovered and preserved through his instrumentality, for the amount of his costs as solicitor for the plaintiff in the probate action. The learned judge refused to make the order applied for on the ground that no property had been recovered or preserved by the action within the meaning of the section.

W. H. Stevenson, for the applicant. The applicant is entitled to a charge for the amount of his costs upon the property devised and bequeathed by the testator's will as being property recovered or preserved through his instrumentality in the probate action. The interests which depended upon the will were preserved by the establishment of its validity. The wife's life interest was clearly preserved, for in the event of an intestacy she would have had no interest in the realty, if there had been a declaration against dower, or, if there had been no such declaration, she would only have been entitled to a third for life. The illegitimate daughter would have taken nothing in the event of an intestacy, and therefore her interest was preserved by upholding the will. The interest which the legitimate daughter in fact has she takes by the devise, and that interest was preserved by the establishment of the will. It is immaterial that she was heiress-at-law. The Court cannot speculate as to what interest she might have taken, if the will propounded by the plaintiff in the probate action had not been established. Another testamentary disposition might then have been set up. It is sufficient to render the 28th section of the Solicitors Act, 1860, applicable that the interests taken

(1) See *In re Harrison and Bottomley*, [1899] 1 Ch. 465.

by the parties under the will which it is sought to charge were preserved by the probate action. The case of *Bulley* v. *Bulley* (1) is analogous to the present case, and is an authority in the applicant's favour. The charge under the Solicitors Act, 1860, s. 28, is in the nature of salvage and may be made on the interests of persons who did not employ the solicitor and who were not parties to the suit, if they adopt the benefit obtained in it: *Greer* v. *Young*. (2) The effect of the judgment in the probate action was to establish the validity of the will as regards the realty: *Beardsley* v. *Beardsley*. (3) [He also cited *Catlow* v. *Catlow*. (4)]

F. J. Lampard, for the parties interested under the will. There was no property recovered or preserved in the probate action within the meaning of s. 28 of the Solicitors Act, 1860. The property contemplated by the section is property which but for the exertions of the solicitor would not have existed. The property affected by the will clearly cannot be said to have been recovered in the probate action, nor can it be said to have been preserved in that action.

A. L. SMITH L.J. This is an application by a solicitor for a charge upon property under s. 28 of the Solicitors Act, 1860. The circumstances in which the application is made are as follows. A man named Gresham made a will, by which he gave his second wife a life interest in his property with remainder to his two daughters, one legitimate and the other illegitimate, in equal shares, and made one Woods his executor. On his death probate of the will was opposed by the daughters, who entered a caveat; and in consequence there was an action by the executor in the Probate, Divorce and Admiralty Division to establish the will, the result of which was that the will was upheld. The solicitor who acted for the executor in that action, having taken certain steps to recover his costs which have proved fruitless, now asks for a charging order under the Solicitors Act, 1860, s. 28, on the ground that property has been recovered or preserved in the action through his instrumentality.

(1) (1878) 8 Ch. D. 479.
(2) (1883) 24 Ch. D. 545.
(3) [1899] 1 Q. B. 746.
(4) (1877) 2 C. P. D. 362.

C. A. 1899

TWEED, *Ex parte*.

A. L. Smith L.J.

He says that through his instrumentality the will was upheld, and the property bequeathed and devised thereby was preserved—in other words, he says that the interests given by the will to the wife and to the illegitimate daughter were preserved, and that, though the legitimate daughter would in the event of intestacy have taken as heiress-at-law, nevertheless the interest which she takes under the will was also preserved; and therefore he asks for an order that his costs may be charged upon the property devised and bequeathed by the will which was established. The question is whether in the circumstances which I have detailed the applicant has succeeded in shewing that the property upon which he seeks to obtain a charge for his costs has been preserved through his instrumentality in the action. In my opinion he has done so. The cases of *Bulley* v. *Bulley* (1), *Catlow* v. *Catlow* (2), and *Greer* v. *Young* (3) appear to me to shew that there is jurisdiction under the circumstances which exist in the present case to make the order which is applied for, and that it ought to be made. The appeal will therefore be allowed.

RIGBY L.J. I am of the same opinion. It appears to me upon the authority of the cases cited to us and the principles therein laid down that the property with reference to which the application is made has been preserved in the action through the instrumentality of the applicant, within the meaning of s. 28 of the Solicitors Act, 1860; and therefore there is jurisdiction to make a charging order under that section.

VAUGHAN WILLIAMS L.J. I agree; and I propose only to add a few words with regard to what seems to me a peculiar feature of this case, which as I conceive is not exactly covered by any of the cases cited. So far as the personalty was concerned the executor was a trustee, and the proceedings, which it was his duty as such trustee to take, having resulted in the establishment of the will, no doubt the personal property was

(1) 8 Ch. D. 479. (2) 2 C. P. D. 362.
(3) 24 Ch. D. 545.

thereby preserved within the meaning of the section. But the bulk of the testator's estate was realty, with regard to which, as I understand the will, the executor was in no sense a trustee. The connection between the proceedings taken by him and the realty comes about thus. Originally the probate of a will did not affect the realty or those interested in it in any way, and, if an action of ejectment was brought to try the title to realty, which incidentally involved the question of the validity of a will, though the will had been established in a probate action so far as personalty was concerned, nevertheless the whole matter had to be tried over again. Then came the statute, 20 & 21 Vict. c. 77, ss. 61, 62, the object of which was to prevent the scandal of having the same question tried twice over. The result of that enactment is that, under the conditions therein specified, the obtaining of probate will bind the heir-at-law or other persons interested in the realty. In the case now before us the heiress-at-law had entered a caveat and was a party to the proceedings in the probate action, and was absolutely bound by the result of that action. Under these circumstances, I think it may accurately be said that the probate action preserved the realty for the devisees, and therefore the order may properly be made for a charge, not only on the personalty, but also on the realty which passed under the will.

Appeal allowed.

Solicitors for applicant: *Clinton & Co., for F. G. Tweed, Gainsborough.*

Solicitors for appellant: *F. D. W. Hatton, for C. T. Rhodes, Halifax.*

E. L.

1899
June 16, 22.

[IN THE COMMERCIAL COURT.]

THE GREAT WESTERN RAILWAY COMPANY *v.* THE LONDON AND COUNTY BANKING COMPANY, LIMITED.

Banker — Cheque — Defective Title — Payment in good Faith and without Negligence — Liability of Banker — "Customer" — Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 82.

Whether a person is a "customer" of a bank, within the meaning of the Bills of Exchange Act, 1882, s. 82, is a question of fact.

By s. 82, where a banker, in good faith and without negligence, receives payment for a customer of a crossed cheque, and the customer has no title, or a defective title, the banker incurs no liability to the true owner by reason only of having received payment.

A rate collector had been in the habit of receiving cheques for rates, and cashing them at a country branch of the defendants' bank, where he was known, but had no account. By falsely pretending that a rate was due he obtained from the plaintiffs a cheque, drawn to his order on a London bank, crossed generally, and marked "not negotiable," which he presented at the defendants' branch bank. The cheque was cashed, and a portion of the proceeds applied according to the collector's request. The balance was paid to him, and he appropriated it.

On the trial of an action to recover the cheque, or its proceeds, it was found as fact that the defendants received payment in good faith and without negligence, that they received it for the collector, and that the collector was a customer:—

Held, by Bigham J., that the defendants were protected by s. 82, and were not liable.

TRIAL of action in the Commercial Court.

The plaintiffs sued to recover the sum of 142*l.* 10*s.*, as money received by the defendants to the use of the plaintiffs, or, in the alternative, as damages for the conversion of a cheque.

The material facts, which were proved or admitted at the trial, are fully stated in the judgment. (1)

(1) The following are the provisions of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), on which the decision of the questions raised in the case turned:—

Sect. 29, sub-s. 2 . . . . : "The

June 16 *H. D. Greene, Q.C.* (*Park Goff* with him), for the plaintiffs. The defendants are liable, either for a conversion of the cheque, or for its value, for the plaintiffs are entitled to waive the tort, and claim the amount for which the cheque was drawn as money received to their use. The defendants will rely on s. 82 of the Bills of Exchange Act, 1882, but they did not receive payment of the cheque for a customer, within the meaning of that section, and therefore are not protected from liability, for they had no better title than Huggins had: s. 81. Huggins, who had no banking account at the defendants' bank, was not a "customer," within the meaning of s. 82: *Mathews* v. *Brown & Co.* (1); *Lacave & Co.* v. *Crédit Lyonnais.* (2)

[BIGHAM J. Whether he was a customer or not is a question of fact.]

In any case the defendants did not receive payment for

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title of a person who negotiates a bill is defective, within the meaning of this Act, when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

Sect. 79, sub-s. 2: "Where the banker on whom a cheque is drawn . . . . pays a cheque crossed generally otherwise than to a banker, or, if crossed specially, otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid."

Sect. 80: "Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and, if crossed specially to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights, and be placed in the same position, as if payment of the cheque had been made to the true owner thereof."

Sect. 81: "Where a person takes a crossed cheque which bears on it the words 'not negotiable,' he shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had."

Sect. 82: "Where a banker, in good faith and without negligence, receives payment for a customer of a cheque, crossed generally, or specially to himself, and the customer has no title, or a defective title, thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

(1) (1894) 63 L. J. (Q.B.) 494.

(2) [1897] 1 Q. B. 148.

1899

GREAT WESTERN RAILWAY v. LONDON AND COUNTY BANKING COMPANY.

Huggins. They received payment for themselves; in fact they bought the cheque.

A. T. Lawrence, Q.C. (*Guy Lushington* with him), for the defendants. The defendants are protected by s. 82. The right inference from the facts, as to the course of business between the defendants and Huggins, is that they received the cheque for Huggins. Also Huggins was a customer of the defendants. It is not necessary, in order to be a customer, that a person should have a banking account with the bank. The business relations between the defendants and Huggins, which had existed for many years, were sufficiently close to constitute him a customer, within the meaning of s. 82. In *Mathews* v. *Brown & Co.* (1) Cave J. said: "The word 'customer,' and the sense in which it is used, involves something of use and habit." These words are distinctly applicable to the present case. However defective the title of Huggins may have been, the transaction is not void; it cannot be more than voidable: *White* v. *Garden* (2); and it has not been avoided. This distinguishes the present case from cases where there has been forgery, such as *Arnold* v. *Cheque Bank* (3); *Mathews* v. *Brown & Co.* (1); *Lacave & Co.* v. *Crédit Lyonnais.* (4) In order to support the plaintiffs' contention, that the defendants can be liable for money received, it would be necessary to read into s. 81 the words "or the proceeds thereof."

H. D. Greene, Q.C., in reply, referred to *Mathiessen* v. *London and County Bank* (5); *Fisher* v. *Roberts* (6); *National Bank* v. *Silke* (7); *Kleinwort, Sons & Co.* v. *Comptoir National d'Escompte de Paris.* (8)

Cur. adv. vult.

June 22. The following written judgment was delivered by

BIGHAM J. This was an action brought for 142*l.* 10*s.*, money had and received by the defendants to the use of the plaintiffs,

(1) 63 L. J. (Q.B.) 494.
(2) (1851) 10 C. B. 919.
(3) (1876) 1 C. P. D. 578.
(4) [1897] 1 Q. B. 148.
(5) (1879) 5 C. P. D. 7.
(6) (1890) 6 Times Rep. 354.
(7) [1891] 1 Q. B. 435.
(8) [1894] 2 Q. B. 157.

or, in the alternative, for damages to a like amount for the conversion of a cheque. The facts were as follows:—

One Huggins had been for many years a rate collector in the employment of the Wantage Rural District Council, and for other similar bodies. In this capacity he had been in the habit of receiving from the plaintiffs and others cheques for the amounts payable by them for rates, and the cheques he received he used frequently to cash through the defendants' branch bank at Wantage. He had been in the habit of cashing cheques in this way for fifteen or twenty years, and a considerable number of such cheques (fifty or sixty) were cashed by him in the course of each year. Apparently Huggins, on receipt of the money for the cheques, distributed it among the local bodies to whom he had to account. He was well known to the manager and officials of the bank at Wantage. The bank were the bankers of the Wantage Rural District Council. Huggins, however, kept no account with the defendants, nor had he any pass-book; each of his transactions with the defendants were completely disposed of as and when he brought the cheques.

In November, 1898, Huggins falsely pretended to the plaintiffs that a rate had been made, and that the plaintiffs owed in respect of the same 142*l.* 10*s.* By this means he induced the plaintiffs to give him their cheque for that amount. The cheque was drawn on the London Joint Stock Bank in favour of Huggins or order; it was crossed generally, and marked "not negotiable." On November 16, Huggins, in accordance with his usual course of dealing with the defendants, took this cheque to their bank at Wantage to get it cashed. He handed it across the counter to the bank clerk, and the latter filled up a paying-in slip, which Huggins signed. This paying-in slip contained no reference to the cheque itself, but purported to shew a payment into the bank of 142*l.* 10*s.* in money, a payment out to Huggins of 117*l.* 10*s.*, and a payment to the credit of the district council's account at Huggins' request of 25*l.* The business effect of this was, that the bank handed to Huggins the amount of the cheque, 142*l.* 10*s.*, which he there and then disposed of to his own use. Having thus obtained the cheque, the defendants crossed it to themselves, and sent it

1899

GREAT WESTERN RAILWAY v. LONDON AND COUNTY BANKING COMPANY.

Bigham J.

up to their head office in London for collection. It was duly presented and paid.

The question is, whether the defendants are liable to account to the plaintiffs for the money so paid.

Now, if this cheque had neither been crossed nor marked "not negotiable," there could be no doubt as to the right of the defendants to retain the proceeds. It would be true to say that Huggins' title to it was defective: see s. 29, sub-s. 2, of the Bills of Exchange Act; but, inasmuch as the defendants took the cheque in good faith and for value, and without any notice of the defect, the plaintiffs would have no cause of action against them. What, then, is the effect of the crossing? The effect of crossing a cheque is stated in s. 79, sub-s. 2, of the Act. It is, that, if the banker on whom it is drawn pays it otherwise than to a banker, he renders himself liable to the true owner for any loss he may sustain owing to the cheque having been so paid. Then s. 80 provides that, if the banker on whom the cheque is drawn pays it in good faith and without negligence to another banker, he shall stand in the same position as if he had made the payment to the true owner of the cheque. These two sections deal with the liabilities and rights of the banker on whom the cheque is drawn. The next two sections define the position—first, of any person who may take a crossed cheque marked "not negotiable," and, secondly, of a banker who receives payment for a customer of a crossed cheque. Sect. 81 provides that a person who takes a crossed cheque marked "not negotiable" shall have no better title than the person from whom he took it had. Sect. 82 provides that where a banker, in good faith and without negligence, receives payment for a customer of a crossed cheque, and the customer has no title, or a defective title, to it, the banker shall incur no liability to the true owner by reason only of having received such payment.

Applying the law as contained in these sections to the facts of this case, it appears to me that Huggins, who as I have said had only a defective title to the cheque, could give no better title to the defendants, because the cheque was crossed and marked "not negotiable"; but that, though he could only

give a defective title to the defendants, yet, if the defendants, being bankers, can shew that they did no more than receive payment of the cheque in the manner described in s. 82, they are protected.

Now, I find as a fact that the defendants received the payment in good faith and without negligence. I find, also, that they received it for Huggins. It was argued that they did not receive it for Huggins, but for themselves. It was said that they bought the cheque; but, if by this expression is meant that they took the cheque without recourse, I am clearly of opinion that the contention is wrong. What the bank did was this. They advanced 142*l.* 10*s.* to Huggins, and Huggins became their debtor to that amount; they then undertook with him to send forward the cheque for collection, and to apply the proceeds, when received, to the extinguishment of his indebtedness. This, in my opinion, amounted to receiving the money for Huggins. Suppose the bank had not paid any money to Huggins on November 16, could it then be argued that, in presenting the cheque, they were not presenting it for him? Clearly not; and I cannot see why the fact that they paid him the money on November 16, in anticipation of the payment of the cheque next day in the Clearing-house, should make any difference.

Only one question then remains—the real question in the case. Was Huggins a customer, within the meaning of s. 82? Now, whether a person is or is not a customer of a bank must be a question of fact, to be determined with reference to the circumstances of each case. It is undesirable to attempt to define what constitutes a man a customer of a bank. It is much better to leave the question at large, so that a jury or the Court may deal with each case as it arises. The Act of Parliament has not attempted any definition; banker is defined, but not customer; and I think the Legislature wisely omitted to define the expression. Then, was Huggins in fact a customer? I think he was. He had been in the habit for many years of using the defendant bank in connection with transactions which undoubtedly constitute part of a banker's business—namely, the collection of cheques; and he was well

1899

GREAT WESTERN RAILWAY v. LONDON AND COUNTY BANKING COMPANY.

Bigham J.

known to the bank. This is, I think, sufficient to constitute him a customer, within the meaning of the section.

I come, therefore, to the conclusion that the defendants are entitled to the protection of the section, and are consequently not liable in this action. In these circumstances it becomes unnecessary for me to deal with the other questions raised in argument by Mr. Lawrence.

Judgment for the defendants.

Solicitor for plaintiffs: *Robert Rogers Nelson.*
Solicitors for defendants: *Harries, Wilkinson & Raikes.*

P. B. H.

C. A.

1899
May 17;
June 14.

[IN THE COURT OF APPEAL.]

BRANKELOW STEAMSHIP COMPANY, LIMITED, AND OTHERS *v.* CANTON INSURANCE OFFICE, LIMITED.

Insurance (Marine)—Lump Chartered Freight—Loss not by Perils insured against—Cesser of Liability Clause—Loss of Bill of Lading Freight—Waiver of Lien for Chartered Freight.

Shipowners effected a policy of marine insurance on chartered freight under a charterparty, by which a ship was chartered for a voyage at a lump freight, and it was provided that the master should sign bills of lading at any rate of freight the charterers might require, but not under chartered rates, or difference to be settled in cash on signing bills of lading, that the charterers' liability should cease upon shipment of the cargo, provided the cargo was worth the freight, dead freight, and demurrage on arrival at the port of discharge, and that the vessel should have a lien on the cargo for recovery of all freight, dead freight, demurrage, and all other charges whatsoever. The charterers loaded the ship with a general cargo, and the master signed bills of lading, by which the goods mentioned in each bill of lading were made deliverable to the consignees thereof upon payment of the bill of lading freight in respect of those goods. The total amount of the bill of lading freight on the goods shipped exceeded the amount of the chartered freight. On the voyage the ship ran aground, and a certain portion of the cargo was in consequence jettisoned or otherwise lost. The ship, having been floated again, ultimately completed her voyage with the remainder of the cargo, which was worth the freight, dead freight, and demurrage on arrival of the ship. Owing to the loss of cargo as before mentioned, the amount of the bill of lading freight received by the shipowners was less than that of the chartered freight. The ship-

owners brought an action against the underwriters on the policy to recover the difference between the two amounts :—

Held, that the action was not maintainable, the loss not having been occasioned by a peril of the sea, but by the plaintiffs' own action in not so framing the bills of lading as to preserve to themselves their lien over the whole cargo for the chartered freight.

APPEAL from the judgment of Bruce J. in an action tried by him without a jury.

The action was upon a policy of marine insurance on chartered freight.

The plaintiffs, the Brankelow Steamship Company, Limited, by a charterparty dated September 17, 1896, chartered their steamship *Ramleh* to Messrs. Williams & Co. for a voyage from the river Plate to Liverpool at the lump freight of 3000*l.* payable on the delivery of the cargo in cash. Clause 18 of the charterparty provided as follows : "The master to apply at the offices of charterers or their agents to sign bills of lading at any rate of freight the charterers or their agents may require, but not under chartered rates, or difference to be settled in cash on signing bills of lading. Charterers' liability to cease upon shipment of the cargo (provided said cargo is worth the freight, dead freight, and demurrage on arrival at port of discharge), but vessel to have a lien thereon for recovery of all freight, dead freight, demurrage, and all other charges whatsoever." The charterers fully loaded the ship with a general cargo under the charterparty, and the master signed bills of lading by which the goods mentioned in each bill of lading were made deliverable to the consignees thereof upon payment of the bill of lading freight in respect of those goods. The aggregate of the bill of lading freight on the goods shipped exceeded the amount of the chartered freight. Upon November 11, 1896, the plaintiffs caused a policy of marine insurance to be effected with the defendants to cover the chartered freight upon the voyage mentioned in the charterparty, the insurance being described in the policy as being on "Three thousand pounds freight chartered, or as if chartered, so valued, on board or not on board." In the course of the voyage the ship ran aground, and in consequence a portion of the cargo had to be

C. A. 1899

BRANKELOW STEAMSHIP COMPANY v. CANTON INSURANCE OFFICE.

jettisoned or was otherwise lost. Having been floated again, she ultimately proceeded on her voyage, and arrived at Liverpool with the remainder of her cargo, which was worth the freight, dead freight, and demurrage on arrival of the ship. Owing to the loss of cargo as before mentioned, the amount of the bill of lading freight received by the plaintiffs upon the cargo delivered at Liverpool was less than that of the chartered freight by the sum of 645*l.* The plaintiffs sued the defendants upon the policy to recover for a loss by perils of the sea of chartered freight to that amount.

The learned judge gave judgment for the defendants.

May 17. *Joseph Walton, Q.C.*, and *Pickford, Q.C.* (*Horridge* with them), for the plaintiffs. There was in this case a loss by the shipowners of chartered freight, which was the subject-matter of the insurance, through perils of the sea. By the terms of the cesser of liability clause in the charterparty the charterers' liability was to cease upon shipment of the cargo, provided the cargo was worth the freight, dead freight, and demurrage on arrival at the port of discharge, which was the case. It was contemplated by the charterparty that upon cesser of the charterers' liability the shipowners should look to the bill of lading freight for payment of the chartered freight. The bill of lading freight would, if the voyage had been completed without disaster, have more than covered the chartered freight. But, by reason of the loss of part of the cargo through perils of the sea, the bill of lading freight payable on arrival of the ship fell short of the amount of the lump chartered freight by 645*l.*; and therefore there was a loss by the shipowners of the chartered freight to that extent by perils of the sea. Through a peril insured against, the shipowners could not get paid the whole of their chartered freight in the way in which they would otherwise have been paid, and in which it was contemplated by the charterparty that they should be paid, namely, by receiving the bill of lading freight. (1)

(1) The charterers were joined with the shipowners in the action as alternative plaintiffs, it being admitted that the policy was effected by agents

Carver, Q.C., and *J. A. Hamilton*, for the defendants. The loss of chartered freight did not arise from perils of the sea, but by reason of the fact that the shipowners did not choose to enforce their lien upon the cargo for the chartered freight. The charterer's liability is not extinguished by the cesser clause unless an equivalent lien is given to the shipowner: *Clink* v. *Radford* (1); *Hansen* v. *Harrold Brothers*. (2) The charterparty provided for a lien on the cargo for the chartered freight. It is stated therein that the shipowners shall have a lien on the cargo for "all freight, dead freight, demurrage, and all other charges whatsoever." There was nothing in the charterparty to prevent the shipowners from stipulating in the bills of lading for a lien for the chartered freight upon the goods therein mentioned. The provision that the master should sign bills of lading at any rate of freight the charterers might require did not prevent their doing so. The words are not "sign bills of lading as presented," but "sign bills of lading at any rate of freight the charterers or their agents may require." If the shipowners did not obtain a lien on the cargo for the chartered freight, it was because they chose to ship the cargo in a particular way. The charterparty does not, as suggested, provide that the chartered freight shall be payable out of bill of lading freight only. No doubt in practice that is a convenient mode of satisfying the chartered freight; but there is no agreement that the chartered freight shall be so satisfied. What was lost in this case by perils of the sea was not chartered freight, but bill of lading freight. The risk on an insurance of lump chartered freight is wholly different from that on an insurance of bill of lading freight. A loss does not take place in the case of the former unless all the cargo is lost: *Merchant Shipping Co.* v. *Armitage*. (3) The underwriters cannot know what are the terms of the bills of lading given by the shipowners.

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acting on behalf of all the plaintiffs to cover the interests of all the plantiffs. But, as will be seen from the judgment, the Court was clearly of opinion that the terms of the policy could not cover any interest of the charterers.

(1) [1891] 1 Q. B. 625.

(2) [1894] 1 Q. B. 612.

(3) (1873) L. R. 9 Q. B. 99.

C. A. 1899

BRANKELOW STEAMSHIP COMPANY v. CANTON INSURANCE OFFICE.

Pickford, Q.C., in reply. It may be admitted that the cesser of the charterer's liability does not take place until a corresponding lien is given to the shipowner; but here such a lien was given in the way contemplated by the charterparty. It is submitted that, on the true construction of the charterparty, the way in which the lien under it was to be given was that the shipowners were to have a lien on each parcel of goods shipped for the freight payable in respect thereof, not that there should be a lien on each parcel for the whole of the chartered freight. The provision that any amount by which the chartered freight exceeded the bill of lading freight should be paid in cash shews that to be so, for it would have been unnecessary if there was to be a lien for the whole of the chartered freight on each parcel of goods shipped. [He cited *Gardner* v. *Trechmann* (1); *Inman Steamship Co.* v. *Bischoff*. (2)]

Cur. adv. vult.

June 14. A. L. SMITH L.J. read the following judgment:— By a charterparty dated September 17, 1896, the plaintiffs, the Brankelow Steamship Company, Limited, let their steamship *Ramleh* on hire to Messrs. Williams & Co., the charterers, for a voyage from the river Plate to Liverpool at the lump freight of 3000*l.*, payable on the delivery of the cargo in cash. Upon November 11, 1896, the plaintiffs caused a policy of marine insurance to be effected with the defendants, the Canton Insurance Office, Limited, to cover the lump chartered freight upon the voyage in question against perils of the sea, the freight insured being thus described in the policy: "On 3000*l.* freight, chartered or as if chartered, so valued, on board or not on board." I leave out the other plaintiffs upon the record—namely, the charterers of the ship—for I agree with Mr. Carver that the defendants undertook no liability as to them under the policy. (3) It was the shipowners' lump chartered freight and nothing else which they covered by the policy against perils of the sea. The charterers loaded a full cargo under this charter,

(1) (1885) 15 Q. B. D. 154. (2) (1882) 7 App. Cas. 670.
(3) See ante, p. 180, n.

A. L. Smith L.J.

and in due course the ship arrived at Liverpool with the cargo on board, excepting a portion represented by bills of lading freights amounting to the sum of 645*l.*, which cargo by reason of a sea peril had been jettisoned, or lost upon the voyage, and it is these bills of lading freights amounting to 645*l.* which the plaintiffs seek to recover from the defendants under their policy covering lump chartered freight.

Now, if there were no other facts in this case but those above mentioned, there cannot be a doubt that there would have been no loss of lump chartered freight by a peril of the sea, for it has been often held that upon a charter at lump chartered freight the whole amount is payable by the charterer to the shipowner upon the arrival of the ship, and that the right to this payment is not conditional upon the delivery of the full cargo at the port of destination, and, if part of the cargo has been lost by reason of a peril of the sea upon the chartered voyage, the lump chartered freight without deduction is nevertheless payable by the charterer to the shipowner on delivery of the remainder of the cargo at the port of discharge: see *Merchant Shipping Co.* v. *Armitage* (1) and other cases cited by Mr. Carver in his excellent work on Carriage by Sea, ed. 1885, pp. 549, 550, and this was not disputed at the Bar. The plaintiffs consequently could have had no claim against the underwriters for loss of lump chartered freight, for the whole of this freight they could have recovered from the charterers, although a portion of the cargo had been lost on the voyage. That the liability of underwriters when underwriting lump chartered freight is very different and less onerous than when underwriting freight in general represented by bills of lading freights is obvious, and this cannot be denied.

But the plaintiffs allege that in the charterparty in this case there is a cesser of liability clause coupled with a lien which appears to me to be of the ordinary description. It is as follows: "The master to apply at the offices of charterers or their agents to sign bills of lading at any rate of freight the charterers or their agents may require, but not under chartered

(1) L. R. 9 Q. B. 99.

C. A. 1899

BRANKELOW STEAMSHIP COMPANY v. CANTON INSURANCE OFFICE.

A. L. Smith L.J.

rates, or difference to be settled in cash on signing bills of lading. Charterers' liability to cease upon shipment of the cargo (provided the said cargo is worth the freight, dead freight, and demurrage on arrival at port of discharge), but the vessel to have a lien thereon for recovery of all freight, dead freight, demurrage, and all other charges whatsoever." It is argued for the plaintiffs that, inasmuch as they had by this clause given up their right against the charterers for the 3000*l.* upon the shipment of the cargo, and that, as they had taken no lien upon the cargo which arrived for "all freight," that is, for the whole of the lump freight of 3000*l.*, but only for the respective bills of lading freights which amounted to the sum of 645*l.* less than the lump freight of 3000*l.* by reason of cargo carrying that amount of freight having been lost during the voyage, they were, therefore, entitled to recover these bills of lading freights of 645*l.* from the underwriters of the policy on lump chartered freight.

Now, apart from the fact that a shipowner's right against a charterer under a cesser clause like the present only operates to the extent to which the shipowner has taken a lien for freight — see *Clink* v. *Radford* (1) and *Hansen* v. *Harrold Brothers* (2)—how do matters stand? It is said by the plaintiffs that under this cesser clause the charterers' liability ceased upon shipment of the cargo, and that, as all the shipowners could look to upon the arrival of the ship for the lump chartered freight of 3000*l.* was a lien upon the cargo which arrived for the bills of lading freights thereon, and that, as these bills of lading freights amounted to the sum of 645*l.* less than the 3000*l.* lump freight by reason of a loss by sea perils of the portion of the cargo represented by the 645*l.* bills of lading freights, this loss can be recovered from the underwriters as a loss occasioned by perils of the sea. Although the charterparty was not shewn to the underwriters when they effected the policy, it is obvious that they must have known of the existence of a charterparty, for it was "freight chartered or as if chartered," valued at 3000*l.*, which they insured against perils of the sea, and, as Lord Blackburn in *Inman Steamship*

(1) [1891] 1 Q. B. 625. (2) [1894] 1 Q. B. 612.

Co. v. *Bischoff* (1) said: "Though the underwriters knew .... that there was such a charterparty, under which what was meant to be insured would accrue, it is not in any sense accurate to say that the policy is to be read as if the charterparty was set out in it so as to affect its construction .... But as soon as it is ascertained that the policy attached on the hire under a particular charterparty, the charterparty must be read in order to see how the subject-matter was affected by the misfortune which happened"; and Lord Selborne (2) thus expresses himself: "It appears to me that the question arising upon the policy ought to be determined in the same way as if the charterparty had been seen by the insurers and referred to in the policy, though not, of course, so as to extend the contract of the underwriters by any unnecessary implication to anything not properly covered by the express terms of the policy."

Now, assuming that the underwriters had seen the charterparty in this case with its cesser clause and its corresponding lien, what would they have seen? They would have seen that the captain was to sign bills of lading at any rate of freight not under chartered rates, and that the vessel was to have a lien upon the cargo when shipped for the recovery of *all freight*, and it was in these circumstances that they undertook the risk of covering the lump chartered freight of 3000*l.* against perils of the sea. By whose act was it that the plaintiffs, the shipowners, had not a lien upon the cargo which arrived for all the lump chartered freight (the cargo which arrived being ample to secure this)? Surely that of the shipowners themselves by not taking bills of lading with either the words "freight and all other conditions as per charterparty" therein, or in some other form giving to themselves a lien over the whole cargo which arrived for the recovery of "all freight" as mentioned in the cesser clause. In my opinion there is nothing in the charterparty which would have prevented this being done, the clause as to signing bills of lading having reference only to the question at what rates of freight the bills of lading were to be given, and the clause has nothing to do

(1) 7 App. Cas. 670, at p. 678. (2) 7 App. Cas. at p. 672.

C. A. 1899

BRANKELOW STEAMSHIP COMPANY v. CANTON INSURANCE OFFICE.

A. L. Smith L.J.

with the form in which the bills of lading were to be taken. It may be that the shipowners desired to be able to have recourse to the bills of lading freights, if necessary; but this is not what the underwriters have underwritten. Of the form in which the bills of lading were taken the underwriters knew nothing and were total strangers. Except as to rate of freight, the form was in the power of the plaintiffs. If the plaintiffs had taken bills of lading giving a lien for the chartered freight over the whole cargo which arrived, they would have lost nothing, for the cargo which arrived was, as before stated, of ample value to satisfy the lien for the lump freight. This, however, the plaintiffs did not do, and yet they now seek to recover from the underwriters the 645*l.* bills of lading freights as being a loss by the perils of the sea, which was not covered by the policy. The proximate and real cause of the loss is by reason of the form in which the plaintiffs took the bills of lading, and I agree with my brother Bruce that the plaintiffs have not established a loss of lump freight by perils of the sea, which is the only risk the defendants underwrote. For these reasons I think that this appeal must be dismissed with costs. Romer L.J. concurs in this judgment.

VAUGHAN WILLIAMS L.J. read the following judgment:— The question in this case is whether there has been a loss of chartered freight covered by the policy of insurance entered into by the defendants. The defence as pleaded in effect is that on the arrival the cargo was worth the freight, dead freight, and demurrage, but the bill of lading freight was less than the charterparty freight, and that, in that event, upon the true construction of the charterparty, the charterers remained liable to the shipowners for the charterparty freight, the subject-matter of the insurance, and the same was not lost, if at all, by the perils insured against.

This being an insurance of chartered freight, the shipowners must have an insurable interest in freight, and this they have if, having made a contract, the execution of which will give them freight, their ship, being in a condition to execute the contract, breaks ground on the voyage described in the charter-

party. It follows that in such case, if the ship is prevented from executing the contract contained in the charterparty by one of the perils insured against, they, the shipowners, have lost their freight by that peril and may recover for that loss. There is no dispute in the present case but that the shipowners had an insurable interest in the chartered freight. The cargo contemplated by the charterparty was put on board and the ship duly proceeded on her voyage.

The question raised is whether the ship was prevented by one of the perils insured against from executing the contract contained in the charterparty and thus earning the chartered freight. It is said that the facts set out in the defence shew that the shipowners were not prevented by one of the perils insured against from earning the freight, because the ship arrived with a cargo worth the freight, dead freight, and demurrage, and that, upon the true construction of the charterparty, the charterers remain liable for the chartered freight. I think that, having regard to the terms of the policy, the insurers must be taken to have had notice of the charterparty and its terms: see per Lord Selborne in *Inman Steamship Co.* v. *Bischoff*. (1) This does not mean that the policy is to be construed as if the charterparty was set out in the policy so as to extend the contract of the underwriters to anything not covered by the express terms of the policy, but only that the charterparty must be read in order to see how the subject-matter of insurance has been affected, if at all, by the perils of the sea. If the insurance by the terms of the policy is of lump freight as per charterparty, nothing in the charterparty can convert the contract of the underwriters into an insurance of bill of lading freight, but, if by the terms of the charterparty a lump freight is payable out of the bill of lading freight and not otherwise, a loss of cargo by the perils of the sea to such an extent that there is not sufficient bill of lading freight to pay the amount of the lump freight may be a loss of the lump freight by a peril of the sea. This is expressed in the following passage in Lord Blackburn's judgment in the *Inman Steamship Co.* v. *Bischoff* (2), cited by Barnes J. in his judgment

(1) 7 App. Cas. 670, at p. 672. (2) 7 App. Cas. 670.

C. A. 1899

BRANKELOW STEAMSHIP COMPANY v. CANTON INSURANCE OFFICE.

Vaughan Williams L.J.

in *The Alps* (1): "But, as soon as it is ascertained that the policy attached on the hire under a particular charterparty, the charterparty must be read in order to see how the subject-matter was affected by the misfortune which happened. Under one charterparty a temporary disablement of the ship might occasion a loss for which the underwriters on ship would be responsible, but which would not have any effect at all on the assured's right to recover the hire of the vessel whilst she was disabled. Under another such a temporary disablement might deprive the shipowner of all claim for hire during the time she was disabled. In the first of these cases there could be no claim against the underwriters on freight, for there was no loss of freight. In the second I do not see how it could properly be denied that there was such a loss."

Now, having regard to the terms of the charterparty in the present case, the question is whether, according to those terms, the lump freight is payable out of the bill of lading freight and not otherwise, because if the chartered freight is by the terms of the charter payable out of the bill of lading freight and not otherwise, it would seem to follow that, if by the perils of the sea the goods are lost on the delivery of which, only, the bill of lading freight was payable, the chartered freight has been lost by the perils of the sea. Now, whether chartered freight was payable out of the bill of lading freight and not otherwise depends mainly on the terms of the "cesser clause," i.e., clause 18 of the charterparty. It runs thus: "Bills of lading. The master to apply at the offices of the charterers or their agents to sign bills of lading at any rate of freight the charterers or their agents may require, but not under chartered rates, or difference to be settled in cash on signing bills of lading. Charterers' liability to cease upon shipment of the cargo (provided said cargo is worth the freight, dead freight, and demurrage on arrival at port of discharge), but vessel to have a lien thereon for recovery of all freight, dead freight, demurrage, and all other charges whatsoever."

Now I have no doubt whatsoever but that the charterers' liability for freight has ceased, having regard to the fact of the

(1) [1893] P. 109.

shipment of cargo, and that the said cargo was worth the freight, dead freight, and demurrage on arrival at the port of discharge; nor do I think that it would have made any difference to the "cesser" of liability even if the shipowners had no lien or no effective lien for the recovery of freight: see *French* v. *Gerber*. (1) But it may still be that, according to the true construction of clause 18, the lump freight was not lost by the perils of the sea, but lost because the shipowners having a lien on the cargo (which exceeded in value the amount of the lump freight) did not choose to exercise that lien, or voluntarily chose to sign or let the master sign bills of lading which preclude them from exercising the lien given to them by the charterparty on the cargo for the whole freight, because the bills of lading make the goods the subject thereof deliverable to each consignee on payment by him of the bill of lading freight due in respect of his parcel of goods. Bruce J. (as I understand) was of opinion that under the charterparty the shipowners had a lien on the cargo which arrived (and which cargo exceeded in value the amount of the lump freight) for the lump freight, and that the shipowners deprived themselves of their right to exercise their lien by reason of the master having signed bills of lading binding them to deliver the goods on payment of the bill of lading freight. If so, I agree there has been no loss of lump freight by perils of the sea, and I have reluctantly come to the conclusion that this is the true construction. I tried hard to avoid coming to that conclusion, because it seems to me that the shipowners and the charterers as business men both intended that the master should have no option but to sign bills of lading making the goods the subject thereof deliverable on payment of the bill of lading freight. The provision that the master shall sign bills of lading at any rate of freight the charterers may require, but not under chartered rates, or difference to be settled in cash on signing bills of lading, is a strong indication that the shipowners were to look to the bill of lading freight only for the payment of the chartered freight. But the later words seem to give the shipowners a lien on the cargo for the chartered freight, and I do not see

(1) (1876) 1 C. P. D. 737.

C. A.
1899

BRANKELOW STEAMSHIP COMPANY v. CANTON INSURANCE OFFICE.

Vaughan Williams L.J.

my way to construe these words in the way which is suggested by the earlier words in clause 18 without construing a lien on the cargo for the chartered freight as meaning a lien on the cargo for the bill of lading freight only, which is inconsistent with the words "for recovery of all freight, dead freight, demurrage, and all other charges whatsoever." In other words, one cannot read the words as to the lien on the cargo as giving a lien subject to the signing by the master of bills of lading making the goods the subject of each bill of lading deliverable on payment of the bill of lading freight. I have come to this conclusion more reluctantly, because the result seems to be that, having regard to the terms of the charterparty, the policy was mere waste paper; for, if the ship arrived with goods of sufficient value to cover the freight, the lien would prevent any loss of freight, and, if the goods were of insufficient value, the cesser clause would cease to operate, and the personal liability of the charterers would revive.

Appeal dismissed.

Solicitors for plaintiffs: *Pritchard, Englefield & Co., for Simpson, North & Co., Liverpool.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

E. L.

WARWICK, APPELLANT; GRAHAM, RESPONDENT. 1899 June 9.

Public Health—Justices—Infectious Disorder—Order for Removal of Patient—"Proper Lodging or Accommodation"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 124.

Sect. 124 of the Public Health Act, 1875, enables justices to order the removal to a hospital of any person suffering from a dangerous infectious disorder who is "without proper lodging or accommodation." Where it was proved that a person suffering from such a disorder had proper lodging and accommodation, so far as he himself was concerned, at his father's house, but that he could not be properly isolated and there would be danger of infection to the other inmates of the house if he remained there:—

Held, that there was evidence that he was "without proper lodging or accommodation" within the meaning of s. 124.

CASE stated, under the Summary Jurisdiction Acts, by two justices of the county of Cumberland.

At a court of summary jurisdiction held at Workington, in the same county, an application was made to the justices by the appellant, who was the town clerk and clerk to the urban sanitary authority for the borough and district of Workington, to remove one Walter Graham from the house of his father, the respondent, to a hospital, the medical officer of the district having certified that Walter Graham "was suffering from a dangerous infectious disorder—namely, scarlet fever—and was without proper lodging or accommodation." (1)

Notice of this application was duly given to the respondent and Walter Graham.

At the hearing of the application the following facts were proved or admitted: The respondent's son, Walter Graham,

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 124: "Where any suitable hospital or place for the reception of the sick is provided within the district of a local authority, or within a convenient distance of such district, any person who is suffering from any dangerous infectious disorder, and is without proper lodging or accommodation, or lodged in a room occupied by more than one family, ... may, on a certificate signed by a legally qualified medical practitioner, and with the consent of the superintending body of such hospital or place, be removed, by order of any justice, to such hospital or place at the cost of the local authority. . . ."

1899

WARWICK v. GRAHAM.

aged nine years, was living with him at his house, which was within the borough of Workington. The persons living in the house consisted of the respondent and seven of his family, including Walter Graham, who was suffering from a dangerous infectious disorder, namely, scarlet fever. The house was a four-roomed house containing two rooms—a kitchen and a parlour, the one leading from the other—on the ground-floor, with a small scullery at the back, and on the upper floor two small bedrooms opening into each other.

The patient, Walter Graham, was kept apart in the parlour on the ground-floor, but the family had to pass the door of the patient's room when they went into the street from the kitchen, where the cooking was done and the family lived and took their meals.

The patient was properly cared for so far as concerned nourishment and medical attendance, and no one else slept in the same room with him. He was comfortable and clean and appeared to have good attendance and attention, and the room which he was in was large enough, and there was nothing wrong with it.

The medical men, however, who were called for the appellant and respondent respectively, agreed that it was impossible to isolate the patient properly, and that there would be danger of infection to the other people in the house if he continued to occupy his room during the progress of the illness.

The justices held, as matter of law, that there was not sufficient evidence to shew that the patient, Walter Graham, was "without proper lodging or accommodation," and they refused to make an order for his removal, and dismissed the application.

The question for the opinion of the Court was whether, under the circumstances stated in the case, the justices were justified in refusing to make the order applied for.

Macmorran, Q.C. (*Sylvain Mayer* with him), for the appellant. The justices ought to have made the order for removal. Where a patient is so lodged and accommodated that there must necessarily be danger of infection to the other inmates of

1899

WARWICK v. GRAHAM.

the house, he is "without proper lodging or accommodation" within the meaning of s. 124 of the Public Health Act, 1875.

[DAY J. Sect. 124 is clearly directed, not only to the protection of the sick person himself, but to the protection of other persons from infection.]

No counsel appeared for the respondent.

DAY J. The case must go back to the justices with the intimation of our opinion that they ought to make the order for removal.

LAWRANCE J. concurred.

Judgment for appellant. Case sent back accordingly.

Solicitors for appellant: *Tatham & Procter.*

W. A.

CARRITT, APPELLANT; GODSON & SON, RESPONDENTS.

1899

June 5.

London County—Buildings — Part of Building used for Dwelling-house—Approaches—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*) (*Local*), *s.* 74, *sub-s.* 2.

A fully licensed public-house is not a building "used in part for purposes of trade or manufacture and in part as a dwelling-house" within the meaning of s. 74, sub-s. 2, of the London Building Act, 1894; so that the means of approach to the part used as a dwelling-house need not be constructed of fire-resisting materials as required by that section.

CASE stated by a metropolitan police magistrate.

The respondents, a firm of builders engaged in erecting a public-house, called the Horse and Groom, in St. John Street, Clerkenwell, were summoned before the magistrate to answer a complaint made by the appellant, the district surveyor, for that they had made default in complying with a notice served on them by him and requiring them to amend certain things alleged to have been done by them in the course of erecting such public-house, in contravention of the provisions of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.) (Local).

1899

CARRITT v. GODSON & SON.

The following facts were proved or admitted at the hearing of the summons:—

The Horse and Groom public-house was a building exceeding ten "squares" (as defined by the London Building Act, 1894) in area, and was to be used as a fully licensed public-house. The ground-floor consisted of a bar, lobby, lavatory, w.c., and pot-room. The first-floor consisted of a public room, w.c., lavatory, spirit store-room, kitchen, larder, and scullery. The second and third floors consisted of bed-rooms and living rooms. The only means of communicating between the various floors was a staircase terminating in the lobby on the ground-floor. The licensee and his family would reside in the building, and the whole of the building was covered by justices' and excise licences.

The notice of irregularity served by the appellant on the respondents required them (amongst other things) to construct throughout of fire-resisting materials all passages, staircases, and other means of approach to the part to be used as a dwelling-house, as required by s. 74, sub-s. 2, of the London Building Act, 1894. (1)

In order to get from the street to the lobby and staircase before mentioned it was necessary to enter through the door in front of the bar, and to cross thence through the bar to the lobby, which gave access to the staircase. The door separating the lobby from the bar was to be, and the staircase itself and the lobby were, constructed of fire-resisting materials; but the floor and other parts of the bar were not constructed of such materials.

The lobby, which gave access to the staircase, also opened into a back yard, extending for the whole width of the house and to a depth of 100 feet, surrounded in part by buildings

(1) The London Building Act, 1894 (57 & 58 Vict. c. ccxiii.) (Local), s. 74, sub-s. 2: "In every building exceeding ten squares in area used in part for purposes of trade or manufacture and in part as a dwelling-house the part used for purposes of trade or manufacture shall be separated from the part used as a dwelling-house by walls and floors constructed of fire-resisting materials and all passages staircases and other means of approach to the part used as a dwelling-house shall be constructed throughout of fire-resisting materials."

and in part by a wall eight feet high at its lowest part. There was no exit from the yard except that which led into the lobby.

The magistrate dismissed the summons, being of opinion that the building was not a building used or intended to be used in part for the purposes of trade and in part as a dwelling-house, and that it was not so used or intended to be so used within the meaning of s. 74, sub-s. 2, of the Act. He also held that, even if it was, the way through the bar to the lobby was not, under the circumstances, a means of approach to the part of the building to be used as a dwelling-house.

The question for the opinion of the Court was whether the magistrate's decision was right in law.

Horace Avory, for the appellant. This building was clearly intended to be used in part for the purposes of the trade of a licensed victualler and in part as a dwelling-house. It is, therefore, within s. 74, sub-s. 2, of the London Building Act, 1894, and the magistrate ought to have made the order. The access from the back yard to the part used as a dwelling-house was not a "means of approach" to that part within the section, because the yard was shut in by a wall and buildings, and the only opening into it was from the house.

A. F. Wootten, for the respondents. The whole of a licensed house may be used for the purpose of carrying on the business of a licensed victualler. The licence covers the whole building. Beer could be sold in, and the police could enter, any room in the house. The building, therefore, is not used in part for purposes of trade and in part for a dwelling-house. The section only applies where there is a defined part, such as a shop, used for purposes of trade and the other part is used as a dwelling-house. Public-houses are called dwelling-houses in the Licensing Acts. If a licensed house is within the section, a means of approach constructed of fire-resisting materials was provided in this case. The object of the Act is to enable the inmates of a building to escape from fire. Here they could escape into the back yard through the lobby, which was constructed of fire-resisting materials.

Horace Avory replied.

1899

CARRITT v. GODSON & SON.

DAY J. I find very great difficulty in applying the provisions of s. 74, sub-s. 2, to a building of this description. The particular language used fails to cover it. Sub-s. 2 applies to buildings, exceeding ten squares in area, "used in part for purposes of trade or manufacture and in part as a dwelling-house." I confess that I do not see how it can be said that this building is "used in part for purposes of trade or manufacture." The words seem to cover the case where the trade is carried on, or things are manufactured, in one part of a building but not in the other part. A licensed victualler carries on his trade upon the whole of the licensed premises. He resides, it is true, in one portion of the house, but his licence covers the whole of the house, and he may use any portion of it for the purpose of carrying on his trade. I therefore do not think that this case is brought within the description in sub-s. 2. Further, I cannot understand how sub-s. 2 can apply where there is this open space, leading to which undoubtedly there is a staircase and lobby made of fire-resisting materials as the statute orders. No doubt the exit by the front door might be preferable and more convenient, but still, in case of fire, the people in the house could get out into the open space, which is large enough to contain them and where they would be safe. It is impossible to say that the magistrate ought to have convicted the respondents unless it is clear that they did contravene the statute. I think that the construction which he put upon the section is not unreasonable, and I see no reason to interfere with his decision.

LAWRANCE J. I am entirely of the same opinion. I think that s. 74, sub-s. 2, does not apply to the building in question here. It seems to be intended to apply to the ordinary case of premises the lower part of which is a shop or manufactory and the upper part is used as a dwelling-house. Then the approach to the part which is used as a dwelling-house must be constructed of fire-resisting materials. In ordinary cases there would be no difficulty in doing it, and no difficulty whatsoever in saying what part of the premises was used for purposes of trade or manufacture, and what for a dwelling-house. Here

1899

CARRITT v. GODSON & SON.

Lawrance J.

you have a trade which is necessarily carried on in a dwelling-house. There is no separate part where the trade of a licensed victualler is necessarily carried on, and no separate part which is necessarily used only as a dwelling-house. I think that the magistrate was right in saying that the building was not a building intended to be used in part for the purpose of trade and in part as a dwelling-house. If that be so, it is unnecessary to give a decision on the second point which has been taken; but I think that, under the particular circumstances of this case, there was a proper approach, made of fire-resisting materials, from the back yard to the upper part of the house, so as to comply with the provisions of sub-s. 2.

Judgment for the respondents.

Solicitor for appellant: *W. A. Blaxland.*
Solicitors for respondents: *Layton, Sons & Lendon.*

W. A.

WILLIAMS, APPELLANT; LONDON AND NORTH WESTERN RAILWAY COMPANY, RESPONDENTS.

1899
June 9.

Railway—Rates—Exemptions—Land used as Railway for Public Conveyance—Liverpool Corporation Act, 1893 (56 & 57 *Vict. c. clxxxi.*) (*Local*), *s.* 36 (*ii.*).

The Liverpool Corporation Act, 1893, s. 36, provides that no person occupying "land used as a railway made under the powers of any Act of Parliament for public conveyance" shall be rated in respect of the same to the general rate leviable by the corporation in any greater proportion than one-fourth part of the net annual value. A railway company occupied land in Liverpool for a goods station. The premises consisted of a large covered shed, open on one side; and, on the other, with openings in the walls to admit trucks. Inside the shed were a number of railway lines, comprising sidings, and running alongside platforms, for the purpose of loading and unloading railway trucks with goods. All these lines were used for the conveyance of any goods sent by the public to or from the premises. The premises were some distance from the company's main line, and were connected therewith by a dock line belonging to the Mersey Docks and Harbour Board, who under statutory powers permitted the company to use such line, and by a tramway laid across a street by the

1899

WILLIAMS v. LONDON AND NORTH WESTERN RAILWAY.

company under a licence granted by the corporation under statutory powers. The company's premises were acquired and laid out under powers conferred upon them by a private Act:—

Held, that the land used for the lines, sidings, and platforms inside the company's premises was "land used as a railway made under the powers of an Act of Parliament for public conveyance" within the meaning of s. 36 of the Liverpool Corporation Act, 1893, and that the company were, therefore, entitled to the partial exemption in respect of rating contained in that section.

CASE stated, under the Summary Jurisdiction Acts, by one of the justices of the peace for the city of Liverpool.

At a petty sessions, held for the city of Liverpool, the respondents were summoned to answer an information preferred by the appellant, a collector of rates for the mayor, aldermen, and citizens of the city, alleging that the respondents had not, for the space of fourteen days after demand in writing by the appellant, paid the sum of 109*l.*, being the amount due from them in respect of a rate, called the "general rate," made for the city, and levied upon the respondents in respect of certain premises in their occupation described in the information as "goods station in Sefton Street."

The information was laid and the summons issued under s. 29 of the Liverpool Improvement Act, 1858 (1), incorporated by the Liverpool Corporation Act, 1893 (56 & 57 Vict. c. clxxxi.) (Local).

The following material facts were proved or admitted at the hearing before the magistrate:—

In February, 1898, the mayor and corporation of the city of

(1) Sect. 29 of the Liverpool Improvement Act, 1858 (21 & 22 Vict. c. lxxx.) (Local), provides that if any person, who shall be liable to the payment of any rate made or levied by virtue of the Act, shall refuse, omit, or neglect to pay the amount of such rate for the space of fourteen days after demand any justice, having jurisdiction in the place where such person resides or where the property in respect of which such rate is due and payable is situate, may summon such person to appear to shew cause why the sum demanded should not be paid, and in default of appearance, or if no sufficient cause shall be shewn to the contrary, the justice may issue his warrant of distress for seizure and sale of the goods of such person for the recovery of the amount which may be proved to be due, and if no sufficient goods can be found, the justice may commit such person to prison as therein provided.

Liverpool, acting under the powers conferred upon them by the Liverpool Corporation Act, 1893 (1), levied a general rate upon the premises in question, of which the respondents were and are the owners and occupiers.

In the rate the premises were described as "warehouses and shed," and were assessed at their net annual value. On November 24, 1898, a demand note for the sum of 109*l.*, the amount of the assessment, was served upon the respondents, and on December 29, 1898, the respondents having refused, omitted, or neglected to pay that amount, the appellant, on behalf of the corporation, preferred this information.

The premises in question are known as the "Brunswick Docks Goods Station," and are situated in Sefton Street, in the city of Liverpool. They consist of a substantial erection comprising a covered shed open at one side—namely, the side furthest from Sefton Street. The elevation to Sefton Street is very substantially built with large openings in the wall, which are used for the purposes of admitting both railway wagons, carts, and lorries. These openings can be closed when neces-

(1) By ss. 34 and 35 of the Liverpool Corporation Act, 1893 (56 & 57 Vict. c. clxxxi.) (Local), the corporation are authorized to levy a general rate.

Sect. 36: "The general rate shall be levied on the net annual value of all property for the time being assessed to the relief of the poor and included in the valuation lists of the different parishes in the city in force at the time of the levying of the rate with such additions as may be lawfully made under this Act. Provided that . . . .

"(ii.) No person occupying land used as arable meadow or pasture ground or orchards or allotments only or as woodland market garden or nursery ground or any land covered with water and used only as a dock or a canal or the towing-path thereof or as a railway made under the powers of any Act of Parliament for public conveyance shall be rated in respect of the same to the general rate in any greater proportion than one-fourth part of the net annual value thereof."

Sect. 37 provides that s. 29 of the Liverpool Improvement Act, 1858 (except such portion of s. 29 as authorizes a justice to commit a person to prison for non-payment of rates) shall extend and apply, mutatis mutandis, to the general rate and is incorporated in this Act.

[Sect. 211, sub-s. 1 (*b*), of the Public Health Act, 1875 (38 & 39 Vict. c. 55), contains an exemption similar to that in s. 36 (ii.) of the Liverpool Corporation Act, 1893, in respect of the assessment to any district rate of "land used as a railway constructed under the powers of any Act of Parliament for public conveyance."]

1899

WILLIAMS v. LONDON AND NORTH WESTERN RAILWAY.

sary by sliding gates. Inside the walls there are a number of railway lines, comprising sidings, and running alongside platforms which are used for the purpose of loading or unloading railway wagons with goods. There are also turntables, cranes, a weigh-bridge and small offices. There is also in this inclosure some land upon which nothing is erected, but which is used for carts and lorries for bringing goods to and taking them from the premises.

The premises are situated a little over half a mile from the main line of the company—namely, the Wapping Goods Station. They are, however, connected with the main line of the company at the Wapping Goods Station, and with their several goods stations along the line of docks, by permission having been given to the respondents by the Mersey Docks and Harbour Board to use the board's dock railway, and also by the Liverpool Corporation having granted a licence to the respondents for a tramway, to be laid across Sefton Street, and so connecting the premises with the dock rails there, which run at the side of Sefton Street opposite to the premises. Goods are taken to the premises and brought from them to the main line of the company in railway wagons drawn by locomotives.

The area of the premises is 11,823 square yards, of which 6400 square yards is covered by a roof. The dock line of rails along Sefton Street was constructed by the Mersey Docks and Harbour Board under s. 72 of the Mersey Docks Acts Consolidation Act, 1858 (1), and is governed by that Act. The permission granted to the company by the corporation to lay rails across Sefton Street was granted by the corporation under the powers conferred upon them by s. 100 of the Liverpool

(1) By the Mersey Docks Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.) (Local), ss. 72, 74, as to the Liverpool Docks, the board may maintain the existing lines of rail on the dock, quays, and piers of the board, and may construct and maintain such additional or other lines as they may think expedient on the dock, quays, and piers, and may maintain any lines of rail carried along, over, or across any street in Liverpool, and with the consent of the Health Committee may cause new and additional lines of rail to be carried along, over, or across any street, and may make reasonable charges for the use of their lines of rail.

Improvement and Waterworks Act, 1871 (34 & 35 Vict. c. clxxxiv.) (Local), which enables the corporation to grant to the owner of premises abutting on a street a licence to use a way by means (inter alia) of a tramway across such street, upon specified terms and conditions. The licence was granted by deed. The respondents agreed to pay the corporation 2*l.* 12*s.* per annum for the privilege acquired, and the licence was determinable by one month's notice on either side.

All the lines of rails in the premises in question are used for the conveyance of any goods which the public send by rail to or from the premises in question. The premises in question were constructed by the respondents upon land acquired by them under powers conferred upon them by s. 20 of the London and North Western Railway Act, 1896 (1), which incorporates s. 3 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20).

The magistrate was of opinion that the premises were part of the railway system of the respondents, and that such portion thereof as consisted of railway lines, turntables, sidings, and platforms, together with the portion of the roof covering the same, came within the terms of the partial exemption, contained in s. 36 of the Liverpool Corporation Act, 1893, in respect of "land used as a railway made under the powers of an Act of Parliament for public conveyance," and that the respondents should be rated in respect of such portions on one-fourth part of the net annual value thereof, and that as regarded the remainder of the premises, including the land used for carts and lorries, cranes, weighing machines, offices, the building, and the tramway across the street, they should be

(1) London and North Western Railway Act, 1896 (59 & 60 Vict. c. cxlix.) (Local), s. 20: "Subject to the provisions of this Act . . . . the company may from time to time enter upon, take, use, and appropriate for the purpose of extending the stations, sidings, warehouses, coal wharves, depots, and other accommodation of the company for mineral goods and cattle traffic, and for other purposes connected with their undertaking, the lands hereinafter described . . . . and may execute the works and exercise the powers hereinafter mentioned and so far as such works are shewn upon the deposited plans and sections in accordance with those plans and sections."

[The lands thereinafter described included the land upon which the Brunswick Docks Goods Station was built.]

1899

WILLIAMS v. LONDON AND NORTH WESTERN RAILWAY.

assessed on the full annual value. He therefore dismissed the summons.

The questions for the opinion of the Court (so far as material for the purposes of this report) were :—

1. Whether upon the facts stated the magistrate was bound, under the provisions of s. 29 of the Liverpool Improvement Act, 1858, to issue a warrant for the amount claimed ;

2. Whether upon the facts stated the respondents were entitled to be rated, under the provisions of s. 36 of the Liverpool Corporation Act, 1893, upon one-fourth part of the net annual value of any part of the respondents' premises.

Balfour Browne, Q.C. (*E. Honoratus Lloyd* and *R. M. Montgomery* with him), for the appellant. The respondents are not entitled to the exemption allowed by the magistrate. No part of the premises in question is " land used as a railway made under the powers of any Act of Parliament for public conveyance " within the meaning of s. 36 (ii.) of the Liverpool Corporation Act, 1893. Though the premises themselves have been acquired and laid out under statutory powers, the only access to them is by means of lines which in no sense are public lines. The licence granted to the respondents by the corporation of Liverpool is subject to conditions, and may be determined by one month's notice on either side. The Brunswick Docks Goods Station is not a public railway ; the public have no right to use it. In *South Wales Ry. Co.* v. *Swansea Local Board of Health* (1), decided under s. 88 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), which contained a proviso of exemption in identical terms, it was held that " railway " in the proviso meant the way on which the carriages ordinarily went, including the line itself, the turntables and sidings, and the land used only for supporting the way, but that the adjuncts, such as stations and warehouses, though necessary for the working of the railway, were not part of it within the proviso, and the land used for those adjuncts was assessable at its full value. In *London and North Western Ry. Co.* v. *Llandudno Improvement Commissioners* (2), Wills J., with

(1) (1854) 4 E. & B. 189 ; 24 L. J. (M.C.) 30. (2) [1897] 1 Q. B. 287.

reference to an exemption in the same terms, said (1): "Whatever is absolutely necessary for the physical use of the railway is to be treated as railway. . . . . Now, 'used as a railway' means, I presume, its physical use as a railway. It does not mean those adjuncts to a railway which are necessary for convenient business purposes, or anything of that kind, but it means those things, whatever they be, without which the railway could not be used as a highway." The premises in question here are really nothing more than a receiving office; they are not necessary for the use of the railway as a highway.

C. A. Russell, Q.C. (*William Graham* with him), for the respondents. The case is brought within the terms of s. 36 (ii). of the Liverpool Corporation Act, 1893, by the finding of the magistrate that all the lines of rails in the premises in question are used for the conveyance of any goods which the public send by, to, or from such premises. They were constructed under the powers conferred upon the respondents by s. 20 of the London and North Western Railway Act, 1896, and the fact that they are not used for the conveyance of passengers is immaterial. So is the question whether the access to them is, or is not, over a public line of railway. The platforms and sidings are, for the purposes of the exemption, rateable only as a railway: *London and North Western Ry. Co.* v. *Llandudno Improvement Commissioners.* (2)

The magistrate's decision was, therefore, right.

E. Honoratus Lloyd replied.

DAY J. In my opinion the magistrate's decision was perfectly right. I think that the land in question comes within the partial exemption contained in s. 36 of the Liverpool Corporation Act, 1893. It is, in my view, land used, in part at least, as a railway under the powers of an Act of Parliament for public conveyance, and, therefore, to be rated at no greater proportion than one-fourth part of the net annual value thereof. It is clearly used for public conveyance because goods of the public are taken over it in trucks drawn by locomotive engines.

(1) [1897] 1 Q. B. at pp. 297, 298. (2) [1897] 1 Q. B. 287.

1899

WILLIAMS v. LONDON AND NORTH WESTERN RAILWAY.

DAY J.

It may be true that the access to the premises is over other land which is only used as a means of access under a licence granted to the railway company by the corporation. But the land rated is land occupied by the company, used as a railway made under the powers of an Act of Parliament, and used for public conveyance. It is quite unimportant how the company get to the premises. They do in fact get there habitually—by agreement, it is true, with the corporation—but there is an actual habitual user by them, when they do get there, for public conveyance; and, so long as that state of things continues, they are only liable to be rated at one-fourth of the net annual value. To my mind it is quite immaterial that the licence by the corporation may be determined at short notice. I am of opinion that the respondents are entitled to the exemption which they have claimed.

LAWRANCE J. I agree.

Judgment for the respondents. Leave to appeal refused.

Solicitors for appellant: *F. Venn & Co., for H. E. Clare, Liverpool.*

Solicitor for respondents: *C. H. Mason.*

W. A.

THE UNION CREDIT BANK, LIMITED *v.* THE MERSEY DOCKS AND HARBOUR BOARD.

SAME *v.* SAME.

SAME *v.* SAME AND THE NORTH AND SOUTH WALES BANK, LIMITED.

1899
June 2.

Trover—Conversion—Estoppel—Proximate Cause of Loss—Liability of Warehouseman.

N. pledged with the plaintiffs as security for an advance eighteen hogsheads of tobacco which were in the custody of the defendants as warehousemen. He subsequently repaid the advance on one of the hogsheads, and presented to the plaintiffs for their signature a delivery order on the defendants. On the order the place for the quantity was left blank. The plaintiffs signed the order, and N., having filled in the blank space with the words "eighteen hogsheads," obtained delivery of them all from the defendants, and then disposed of them. In an action against the defendants for the conversion of the seventeen hogsheads :—

Held, that the plaintiffs could not succeed, since they had impliedly given N. authority to fill up the blank in the delivery order, and were now estopped from shewing that that authority was limited.

In the second action it appeared that N. had pledged with the plaintiffs two separate consignments of tobacco. He paid off the advance on one consignment, and presented to the plaintiffs a properly drawn delivery order in respect of it. They signed it, and N. subsequently added above their signature the description and distinguishing marks of the other consignment, and thus obtained from the defendants delivery of both consignments :—

Held, that an action for conversion would lie against the defendants, since the plaintiffs had not been guilty of any negligence which was the proximate cause of the wrongful delivery.

In the third action it appeared that N., after fraudulently obtaining the tobacco as above stated, had pledged it with the defendant bank as security for an advance, and before the fraud was discovered had repaid the advance and recovered possession of the tobacco :—

Held, that no action for conversion would lie against the defendant bank, since N.'s dealing with it had been concluded before the plaintiffs discovered the fraud.

THREE actions tried together at Liverpool before Bigham J. without a jury.

The facts and arguments appear from the judgment.

W. F. K. Taylor, Q.C., and *Tobin*, for the plaintiffs.

1899

UNION CREDIT BANK v. MERSEY DOCKS AND HARBOUR BOARD.

SAME v. SAME AND NORTH AND SOUTH WALES BANK.

Carver, Q.C., and *Leslie Scott*, for the Mersey Docks and Harbour Board.

Pickford, Q.C., and *Maurice Hill*, for the North and South Wales Bank.

Cur. adv. vult.

June 2. BIGHAM J. read the following judgment:—These were three actions brought to recover damages for the alleged conversion of two parcels of tobacco. The first action was brought in respect of seventeen hogsheads ex *Umbria*. The second was brought in respect of five hogsheads, part of a lot of fourteen hogsheads ex *Louisianian*. And the third action was brought in respect of nine hogsheads, being the remainder of the fourteen hogsheads. In the first two actions the Mersey Docks and Harbour Board are now the sole defendants. In the third action the Dock Board and the North and South Wales Bank are joint defendants.

The question so far as the Dock Board are concerned is whether the plaintiffs are entitled to maintain their actions having regard to their conduct. The question so far as the defendant bank is concerned is whether the admitted facts will support a claim in conversion at all.

The circumstances out of which the claim in the first action arose are as follows: The Mersey Dock Board carry on the business of warehouse-keepers, and in that capacity they receive and store tobacco and other goods. In the ordinary and well-known course of this business they furnish the goods' owners with delivery-order forms, which the goods' owners are required to fill up as and when they require the delivery or the transfer of any of their goods. These forms, when properly filled up and signed by the goods' owners, are acted upon by the Dock Board officials either by delivering the goods specified in the order, or by transferring them from one name to another in the books of the board according to the tenour of the order. The forms are so drawn that they may serve the purpose of procuring the delivery or transfer of more than one lot of goods, and they are frequently so used. The form is printed. It begins with a ruled line for the date, and then proceeds as

follows: "To the Mersey Docks and Harbour Board. Gentlemen,—Please ——— to ——— or his assigns." The first of these two blank spaces is for the insertion of the word "deliver" or "transfer," as the case may be; and the second space is for the name of the person in whose favour the order is made. Beneath the words above set out are a number of ruled perpendicular columns with printed headings indicating how they are to be filled up. It is sufficient to refer to three of these columns. The first is headed "Ship," the second is headed "New Numbers," and the third is headed "Quantity," in words at length. In the first column is to be inserted the name of the ship by which the goods have been imported; in the second column are to be inserted the numbers marked on the packages to be delivered; and in the third column is to be inserted the quantity of the goods which the owner desires shall be delivered or transferred. These columns, as I have before stated, are long enough to admit of the insertion of the particulars of many more than one lot of goods, and they are intended by the Dock Board to be so used in case of need. At the bottom of these columns there is a ruled line, apparently intended to indicate where the goods' owner should place his signature.

In August, 1898, one Nicholls, a tobacco broker, pledged with the plaintiffs eighteen hogsheads of tobacco ex *Umbria*, which were at that time in the defendants' warehouse lying at Nicholls' disposal. These goods were duly transferred upon Nicholls' order to the plaintiffs in pursuance of the pledge, and from that time they stood in the defendants' books to the order of the plaintiffs, whose title the defendants acknowledged. Subsequently Nicholls paid off sufficient of the loan made to him by the plaintiffs to entitle him to redeem one of the eighteen hogsheads, and he partly filled up one of the defendants' delivery-order forms, and presented it to the plaintiffs for their signature, so that the delivery of the one hogshead might be obtained by him from the defendants. This order form, as filled up by Nicholls, contained in the first column the name of the ship, *Umbria*; and in the second column the number marked on one of the eighteen hogsheads—namely, "246"; the third

1899

UNION CREDIT BANK v. MERSEY DOCKS AND HARBOUR BOARD.
SAME v. SAME AND NORTH AND SOUTH WALES BANK.

Bigham J.

column, however, in which the quantity of the goods to be delivered ought to have been inserted in words at length, was not filled up at all. In the course of his evidence the plaintiffs' manager told me that when the form was presented to him by Nicholls for signature, he noticed the blank column, and asked Nicholls why it was not filled up; and that Nicholls, in explanation, said he was uncertain whether the tobacco was in tierces or hogsheads, and that he intended to ascertain what the fact was, and to fill up the column accordingly. The manager, being satisfied with this explanation, put the plaintiffs' signature to the document (having authority to do so), and handed it to Nicholls, leaving him to fill up the blank column later on at his own convenience. Nicholls having obtained the plaintiffs' signature to this document, fraudulently altered it—first, by drawing a perpendicular line after the figures "246," and writing in the figures "263" after the line, and then by writing in the third column the words "Eighteen hogsheads"; the full description running—"*Umbria* 246/263 Eighteen hogsheads." This forgery he presented to the officials of the Dock Board, and by means of it obtained delivery of the whole parcel of eighteen hogsheads. The fraud was subsequently discovered, and hence this action. Nicholls has made away with the goods, and is himself not to be found. The plaintiffs say that the defendants have parted with the possession of the goods without authority, and have thereby been guilty of trover; while, on the other hand, the defendants say either that the plaintiffs in fact authorized the delivery, or that, if they did not, they are by their conduct estopped from saying so.

I am of opinion that the plaintiffs are not entitled to recover. When they signed the document and handed it to Nicholls it was not a delivery order at all. It remained a mere delivery-order form with, however, the plaintiffs' signature upon it. The evidence of the officials of the Dock Board satisfies me that if the form as originally signed and issued by the plaintiffs to Nicholls had been presented the officials would have refused to act upon it; and, in my opinion, they would have properly refused to act upon it, for it was wanting in an essential particular, namely, in the statement of the quantity of the goods for

which it was to be operative. Then how and why did it become to all appearance a valid delivery order for eighteen hogsheads? It became in appearance a valid delivery order for eighteen hogsheads because the plaintiffs had constituted Nicholls their agent to convert the order form into an order. I do not lose sight of the plaintiffs' contention that they gave to Nicholls no authority at all to insert the number "263," and that the only authority given to him as to filling up the third column was to fill it up for one package. I think that when in circumstances like the present authority is given to another to fill up such a document as this, so as to convert it into a mandate upon which a third party is to act, the person who gives the authority must be responsible for the consequences of a fraudulent or a careless exercise of the authority. If Nicholls had carelessly but quite honestly filled up the form for more than one package, and having obtained delivery had lost the goods, could the plaintiffs have made the defendants liable? I think not, and it seems to me to make no difference whether the result is produced by carelessness or by design. It must be remembered that as between the plaintiffs and the defendants it was the duty of the former—a duty which they owed to the defendants—to fill in the delivery-order form with such particulars as should guide the defendants in delivering the goods. The performance of this duty they delegated to Nicholls, and they are therefore bound by what Nicholls did in that connection. They intended that the defendants should act upon the document after it was perfected by Nicholls; and I do not think they can be heard to say that they only intended Nicholls to perfect the order in a particular way. I put my judgment on the ground of estoppel. If the plaintiffs were entitled to give in evidence the true facts, they could shew that the only authority with which they entrusted Nicholls was an authority to fill in the form so as to make it a delivery order for one hogshead, and that therefore as it now exists the delivery order was not their order. But I do not think they can be allowed to give this evidence. It would be a most dangerous thing if the law declared that in circumstances such as are found here the warehouse-keeper should

1899

UNION CREDIT BANK v. MERSEY DOCKS AND HARBOUR BOARD.

SAME v. SAME AND NORTH AND SOUTH WALES BANK.

Bigham J.

be liable for the consequences of an excessive exercise of the delegated authority.

I do not forget that the document in this case is not a negotiable instrument. In the head-note to *Swan* v. *North British Australasian Co.* (1) there is a semble "that the doctrine of estoppel by executing instruments in blank is confined to negotiable instruments." If this semble means that the doctrine of estoppel does not extend to cases of other documents even when authority has been given to fill up the blank, I say that there is nothing in the judgments to justify such a semble: nor indeed do I think there is anything in the judgments to justify the semble as it stands. *Swan* v. *North British Australasian Co.* (1) was a case in which estoppel by negligence was attempted to be set up; it has really no application to the present case, and I only refer to it because of what appears to me to be the misleading wording of the head-note. The present case is one of estoppel by representation: the plaintiffs entrusted their agent in that behalf to make a representation to the defendants which they intended the defendants to act upon. He made a representation of the kind intended, and therefore in that respect within the four corners of the authority entrusted to him, but he went beyond the secret limit which was put upon his authority. That secret limitation I do not think the plaintiffs are entitled to set up. Reference was made in the argument to the much-discussed case of *Young* v. *Grote*. (2) That was a case in which the plaintiff Young had left a blank cheque with his wife authorizing her in his absence to have it filled up for such sum as the purposes of his business might require. The wife asked a clerk to fill it up for 50*l*. 2*s*. 3*d*., being an amount required for wages. This the clerk did in her presence; but he did it in such a manner as to enable him afterwards to alter the cheque for 350*l*. 2*s*. 3*d*. The clerk having fraudulently made the alteration obtained the money from the defendants, who were the plaintiff's bankers. The bankers sought to debit the plaintiff's account with the 350*l*. 2*s*. 3*d*., and thereupon the plaintiff brought his action. The judgment was for the defendants; but the reasons given by the four judges who were

(1) (1863) 2 H. & C. 175. (2) (1827) 4 Bing. 253.

parties to the judgment differ. Three of the judges base their judgment on the supposed negligence of the plaintiff—negligence which it was said misled the bankers. I think subsequent decisions shew that this was not the ground upon which the judgment ought to have proceeded. But Park J. put it on the ground that Young, the plaintiff, could not in the circumstances be heard to say that the cheque was not his cheque. The learned judge says: "Can any one say that the cheque signed by Young is not a genuine order? I say it is. The cheques left by him to be filled up by his wife when filled up by her become his genuine orders."

It will be observed that what the wife had been desired by the plaintiff (her husband) to do was "to have the cheques filled up" (1), by which I understand that she was authorized to get some one to do it—as she did. The case, therefore, is just the same as if Young (the plaintiff) had handed the blank cheque direct to his clerk to fill it up for the amount that might be required for wages, and the clerk, in abuse of his authority, had filled the cheque up for double the amount, and had so obtained the money. The interposition of the wife may be struck out as immaterial to the consideration of the judgment. According to Park J., the cheque would have been the husband's, and he would not have been allowed to dispute the right of the defendants to debit him with it merely by shewing that it was filled up for an amount beyond the sum authorized.

Lord Halsbury in his judgment in *Scholfield* v. *Earl of Londesborough* (2) refers to the passage in the judgment of Park J. which I have cited, and describes it as a perfectly sound view upon which *Young* v. *Grote* (3) might be decided in favour of the defendant banker.

The case of *Young* v. *Grote* (3) appears to me to be still an authority for the proposition that where a customer of a bank entrusts another person with a signed cheque, and at the same time authorizes that other to fill up the amount which the banker is to pay, the banker is entitled to debit the customer's account with the amount which may be filled in on the cheque, although

(1) 4 Bing. at p. 254.

(2) [1896] A. C. 514, at p. 522.

(3) 4 Bing. 253.

1899

UNION CREDIT BANK v. MERSEY DOCKS AND HARBOUR BOARD.

SAME v. SAME AND NORTH AND SOUTH WALES BANK.

Bigham J.

the fact be that the customer limited the authority of the person to whom he entrusted the cheque to an authority to fill it up for a less sum than that appearing on the face of the cheque; and I am unable to find any sufficient reason for distinguishing between an order for the payment of money and an order for the delivery of goods. I therefore give judgment in the first action for the defendants.

The second and third actions are different from the first action both in their facts and in the questions which arise upon the facts. In these actions the circumstances were as follows: Nicholls had in pledge with the plaintiffs two lots of tobacco, namely, fourteen hogsheads ex *Louisianian* numbered 266/279, and four hogsheads ex *Vivina* numbered 439, 353, 380, and 363. On July 7, 1898, he brought to the plaintiffs one of the defendants' order forms completely filled up for the transfer to himself of the four hogsheads ex *Vivina* and having paid off the advance which the plaintiffs had made upon that parcel of goods he procured the plaintiffs' signature to the document. Thus the document was, when signed by the plaintiffs, a complete transfer order requiring no further addition to its written contents. No authority of any kind was given by the plaintiffs to Nicholls in connection with this transfer order except the authority to present it to the defendants and obtain the transfer of the goods named in it. There was, however, on the face of the document sufficient blank space to allow of the insertion above the plaintiffs' signature of the particulars of the other parcel of tobacco ex *Louisianian*, and Nicholls fraudulently filled up the space with those particulars, thus turning the transfer order for the one parcel into an apparent transfer order for both parcels. I have already stated that the delivery-order forms are purposely so printed that they may serve the object of obtaining the transfer or delivery of one or more parcels of goods, and they are constantly used in this way. Having made this addition to the order Nicholls presented it to the defendants, and so obtained both parcels of tobacco and made away with them. The plaintiffs claim from the defendants the value of the fourteen hogsheads,

alleging that the defendants have parted with them without authority and have so rendered themselves liable in trover. In answer to this claim, the defendants say that the plaintiffs have by their own negligence contributed to the loss of the goods, and ought therefore not to be allowed to recover. As a matter of fact, the plaintiffs were not in my opinion guilty of any negligence. The negligence alleged against them is that they signed a transfer order so drawn that it was possible for a dishonest man to do what Nicholls did. But in point of fact the order was, when signed by the plaintiffs, in the condition in which thousands of such orders are when signed by merchants. I had a large number of such orders produced before me at the trial, which had been acted upon by the defendants without objection, and which contained ample space above the signature for the insertion of the particulars of additional parcels of goods; and, although a careless act cannot by repetition be converted into a careful act, still, when one is considering what is and what is not carelessness in such a matter as this, I think one must have regard to the common practice of men of business. The defendants were imposed upon by what was, or was equivalent to, a forgery, and it is they who must bear the loss. I asked at the trial how the plaintiffs were to avoid a charge of carelessness such as was made against them, and I was told that it might be avoided by writing the particulars of the various lots of goods so close together and placing the signature in such a position that no addition over the signature could be made; or if not, then by drawing perpendicular lines with the pen through the blank spaces, and so preventing the blank space from being improperly used. I am, however, of opinion that a man who fails to anticipate fraud and to provide against it by these methods is not guilty of carelessness, and, therefore, on the question of fact I find for the plaintiffs. Assuming, however, that I am wrong in this conclusion, and that there was carelessness on the part of the plaintiffs, how is the carelessness to excuse the defendants for the legal wrong they have done to the plaintiffs? To avail the defendants, the carelessness must amount to a neglect of some duty which the plaintiffs owe to the defendants, and the loss must be the natural result of that

1899

UNION CREDIT BANK v. MERSEY DOCKS AND HARBOUR BOARD.

SAME v. SAME AND NORTH AND SOUTH WALES BANK.

Bigham J.

neglect of duty. Dealing with the last point first, how can it be said that the loss of the goods was due to the neglect of the plaintiffs? The omission to fill up the delivery order in the way in which the defendants suggest it ought to have been filled up caused no loss or damage whatever to any one. The real cause of the loss was the fraudulent act of Nicholls: an act never in any sense authorized by the plaintiffs, and for the consequences of which they therefore cannot be held responsible. I do not overlook the contention of the defendants that Nicholls' fraudulent act would not have been possible but for the alleged neglect of the plaintiffs. It is, however, sufficient to point out that a causa sine quâ non will not help the defendants; they must be in a position to rely on a causa causans, and in my opinion they are not in such a position.

It is not necessary for me to say anything upon the question, which was much discussed in argument, as to whether the plaintiffs owed any duty at all to the defendants, but I will express my opinion upon it. It seems to me that the only duty which the plaintiffs owed to the defendants was a duty to express in unambiguous language on the face of the transfer order what the goods were which they desired the defendants to transfer. There was no duty to communicate in any way that they desired no other goods to be transferred. It was said that the case in its facts resembled that of *Young* v. *Grote* (1), and that the conclusion arrived at there ought to be adopted here. I am, however, of opinion that *Young* v. *Grote* (1) can no longer be regarded as good law if the judgment in it is to be read as proceeding on the supposed negligence of the plaintiffs; and I think it therefore has no application to the present case. I find that there was no carelessness in signing the transfer order as filled up, and that there was no duty on the plaintiffs to see that it was filled up differently; and, further, that if there was such a duty the loss of the goods did not result from the breach thereof.

It was in the third action that a claim was made against the North and South Wales Bank. It appeared that Nicholls, after obtaining the transfer to himself of the fourteen hogsheads

(1) 4 Bing. 253.

ex *Louisianian* in the manner before described, pledged nine of the hogsheads with the defendants, the North and South Wales Bank, and caused those nine to be transferred in the Dock Board's books into the name of the defendant bank. The nine hogsheads remained in this position for some time, and then Nicholls paid off the advance which the defendant bank had made to him, and obtained from them a delivery order addressed to the Dock Board, by means of which he got actual possession of the goods. Having thus got possession of the goods, he made away with them. In these circumstances the plaintiffs say that the defendant bank was guilty of conversion. If I am right in holding that the defendants, the Dock Board, are accountable to the plaintiffs for the value of the whole fourteen hogsheads, it becomes really immaterial except on the question of costs to consider what the responsibility of the defendant bank may be in respect of the nine hogsheads. But as the question of the defendant bank's position was argued before me, I think it better to express my opinion upon it. The defendant bank never interfered physically with the goods at all. They made an advance to Nicholls on what they erroneously supposed to be a pledge in their favour of the nine hogsheads. I say erroneously, because in point of law they got no pledge at all, Nicholls not being legally in a position to give a pledge. The only right Nicholls had in the goods was the right to redeem them from the plaintiffs—an equity. Nicholls procured a transfer of the nine hogsheads in the Dock Board books in favour of the defendant bank, and I presume handed to the defendant bank the Dock Board's warrant for the goods. This warrant the defendant bank held as their security until such time as Nicholls came to redeem it. Then they did the only act which can in any way be described as a conversion: they signed a delivery order addressed to the Dock Board authorizing the delivery of the goods to Nicholls, and Nicholls by means of the order got possession. But all this took place before the defendant bank heard or knew anything of the plaintiffs' title. It was not until some time after the whole transaction between themselves and Nicholls was at an end that any demand was made upon the defendant bank by the

1899

UNION CREDIT BANK v. MERSEY DOCKS AND HARBOUR BOARD. SAME v. SAME AND NORTH AND SOUTH WALES BANK.

Bigham J.

plaintiffs, and when that demand was made they were of course unable to comply with it, because they had already returned to the man from whom they got it the constructive possession of the goods. It is as if a thief had given his stolen goods to a carrier to be carried, and the latter at the end of the journey had returned the goods to the thief upon the thief discharging the lien for the carriage. No action in trover would lie in such circumstances against the carrier at the suit of the true owner, nor will such an action lie in the present case against the pledgee. Of course, it would be different if before the thief repossessed himself of the goods the true owner were to demand possession. If he did so and possession were refused, the carrier would be guilty of conversion; so here, if before the defendant bank had parted with the goods the plaintiffs had demanded possession and the defendant bank had refused to comply with the demand, there would have been an exercise of dominion over the goods by the defendant bank inconsistent with the plaintiffs' rights and constituting a wrongful act. But all the defendant bank in the present case did in connection with the goods was to relinquish to the person from whom they had received it the constructive possession. In my opinion this conduct on the part of the defendant bank did not amount to a conversion of the goods.

Judgments accordingly.

Solicitors for plaintiffs: *Bremner, Sons & Corlett, Liverpool.*
Solicitor for Dock Board: *A. T. Squarey, Liverpool.*
Solicitors for North and South Wales Bank: *Hill, Dickinson, Dickinson & Hill, Liverpool.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1899
June 29.

PURVES *v.* STRAITS OF DOVER STEAMSHIP COMPANY.

Ship—Seaman—Termination of Service Abroad—"Passage Home"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 186.

Where the service of a seaman belonging to a British ship terminates at a foreign port, and the master elects to "provide him with a passage home" under s. 186, sub-s. 2 (*c*), of the Merchant Shipping Act, 1894, the master is bound to provide him with a passage to the port in Her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by him.

Dicta in *Edwards* v. *Steel*, [1897] 2 Q. B. 327, followed.

APPEAL from the judgment of Mathew J. (1)

The action was brought by the plaintiff, a sea-going fireman, to recover from the defendants, owners of the steamship *Straits of Dover*, a sum of 1*l.* 5*s.* 3*d.*, which he claimed under s. 186 of the Merchant Shipping Act, 1894, as being the cost of his maintenance and passage home from Antwerp to Newport.

The facts were agreed as follows. On January 19, 1898, the plaintiff shipped at Newport, Monmouth, on board the steamship *Straits of Dover*, in the capacity of fireman, under articles of agreement of the same date, wherein the plaintiff's birthplace was described as Everlady, Haddington; his port of engagement address as 4, Windmill Street, Newport; and his home address as 90, Roseley Drive, Denniston, Glasgow; and the intended voyage was described as being "Newport to Rio de Janeiro and for any ports or places within the limits of seventy-five degrees north and sixty degrees south latitude, the maximum time to be one year's trading in any rotation, and to end in the United Kingdom or Continent of Europe between the Elbe and Brest (inclusive) at master's option."

The plaintiff duly served on board the steamship, which proceeded on her contemplated voyage, and that voyage finally

(1) Reported [1899] 1 Q. B. 38, where the material parts of the sub-section in question are set out.

C. A. 1899

PURVES v. STRAITS OF DOVER STEAMSHIP COMPANY.

terminated on May 9, 1898, at Antwerp, which is a port on the Continent of Europe between the Elbe and Brest.

The master of the steamship thereupon paid off the crew, and, in addition to their wages, tendered in manner provided by the Merchant Shipping Act, 1894, to each member of the crew the sum of 12*s.* 6*d.* for the purpose of providing him with a passage from Antwerp to Harwich (a port in the United Kingdom) together with maintenance upon the said passage. All the members of the crew with the exception of the plaintiff accepted the provision so tendered; but the plaintiff refused to accept either his wages, or passage and maintenance money, unless he was paid in respect of the latter sufficient to enable him to proceed to Newport, and he claimed in respect of such passage money and maintenance the sum of 1*l.* 5*s.* 3*d.*, which the master refused to pay. The wages due to the plaintiff were remitted in the ordinary course to the Mercantile Marine Office at Newport, where they were subsequently received by him. The sum of 1*l.* 5*s.* 3*d.* claimed by the plaintiff was a proper and sufficient sum to provide him with passage-money and maintenance from Antwerp to Newport. The sum of 12*s.* 6*d.* was a proper and sufficient sum to provide him with passage-money and maintenance from Antwerp to Harwich only.

The learned judge gave judgment for the plaintiff.

Joseph Walton, Q.C., and *Lewis Noad*, for the defendants. It is contended that "passage home" in s. 186, sub-s. 2 (*c*), of the Merchant Shipping Act, 1894, means passage to any home port, i.e. any port in the seaman's home country. The word "home" cannot be equivalent to the port at which the seaman was shipped, because that port is not necessarily his home. Of course "home" cannot mean the place of the man's actual residence, if any, because his home may be inland, and the Act only speaks of providing him with a "passage," by which is meant a passage by sea. The enactment contemplates, no doubt, a passage to some port. The meaning is that the seaman is to be repatriated by being sent back to some port in his own country. It must be remembered that the sub-section applies to seamen of all nationalities who may belong

to a British ship, not merely to British seamen. Clauses (*a*), (*b*), (*c*), and (*d*) of s. 186 respectively give the master different alternatives where a seaman is discharged abroad; and it is submitted that the words "passage home" in clause (*c*) ought not to be construed as equivalent to the same thing as is provided for by clauses (*a*) or (*b*). If that had been the intention, the same expression would have been used in clause (*c*) as in the previous clause, and the clause would have run, "provide him with a passage to some such port." Sects. 190 and 191 of the Act are very much in favour of the construction of "passage home" contended for by the defendants.

[A. L. SMITH L.J. Would it, according to the defendants' construction of the sub-section, be a "passage home," if a seaman belonging to England were provided with a passage to some port in Ireland?]

In practice such a question would not be likely to arise under the sub-section. It is submitted that the obligation of the defendants was sufficiently performed by offering the plaintiff a passage to a home port like Harwich. There is no hardship involved in putting the construction suggested on the sub-section, for the voyage for which the plaintiff shipped might have ended at Harwich, or any other place in her Majesty's dominions, and there would then be no obligation to provide the seaman with a passage anywhere. The opinions expressed on this point in the Court of Appeal in *Edwards* v. *Steel* (1) were merely obiter, as that case was decided on clause (*d*) of the sub-section.

Robson, Q.C., and *J. D. A. Johnson*, for the plaintiff, were not called upon.

A. L. SMITH L.J. Notwithstanding the argument of the defendants' counsel, I still remain of the same opinion which I expressed in *Edwards* v. *Steel* (2) with regard to the construction of the enactment in question. I do not think that, in construing a provision in an Act like the Merchant Shipping Act, 1894, which is divided into a number of different subdivisions dealing with different subject-matters, it is any good

(1) [1897] 1 Q. B. 712; 2 Q. B. 327. (2) [1897] 2 Q. B. 327.

C. A. 1899

PURVES v. STRAITS OF DOVER STEAMSHIP COMPANY.

A. L. Smith L.J.

travelling over the whole of the Act from beginning to end. One must look at the particular sub-division of the Act under which the question arises. The section which we have to construe is s. 186. That section is contained in Part II. of the Act, which is headed "Masters and Seamen," and which includes under that heading many sub-headings. Sect. 186 comes under the sub-heading "Leaving Seamen Abroad," and provides what is to be done by the shipowner in a case where, as in the present case, a seaman's service on a British ship terminates at a port out of her Majesty's dominions. The section, after providing that in that case the master shall give the seaman a certificate of discharge in a form approved by the Board of Trade, proceeds as follows: "(2.) The master shall also, besides paying the wages to which the seaman or apprentice is entitled, either—(*a*) provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman, or (*b*) furnish the means of sending him back to some such port, or (*c*) provide him with a passage home, or (*d*) deposit with the consular officer or merchants as aforesaid such a sum of money as is by the officer or merchants deemed sufficient to defray the expenses of his maintenance and passage home." It is obvious that the words "some such port" in clause (*b*) of the sub-section must mean a port such as is mentioned in clause (*a*), namely, the port in Her Majesty's dominions at which the seaman was originally shipped, or a port in the United Kingdom agreed to by the seaman. Under both these clauses the seaman is to be sent back to the port from which he was shipped, unless he agrees to some other port in the United Kingdom. If not to the port of shipment, the seaman is the dominus as to what port he is to be sent to. In my opinion the expression "passage home" in clause (*c*) is the equivalent of what has gone before, namely, that the seaman shall be sent back again to the port at which he was originally shipped, unless he agrees to some other port in the United Kingdom. In the case of *Edwards* v. *Steel* (1) Collins J.

(1) [1897] 1 Q. B. 712; 2 Q. B. 327.

expressed the contrary opinion, but I cannot agree with him. I think the expression "passage home" in clause (*c*) is merely a short way of expressing the same thing as is mentioned in the previous clauses. So also, if under clause (*d*) the master elects to adopt the alternative of depositing with the consular officer a sum of money sufficient to defray the expenses of the seaman's maintenance and passage home, I think it would not be enough to deposit a sum sufficient to pay for his passage to the nearest home port and not sufficient to take him to the port at which he was shipped or to the port the seaman agrees to. If the construction suggested by the defendants is correct, and a "passage home" means a passage to any home port, it would follow that the shipowners, having shipped a seaman, say, at Aberdeen and discharged him at Antwerp, would satisfy their obligation by providing him with a passage to Falmouth. I cannot understand the sense of the distinction between clauses (*a*) and (*c*) (*d*) which the argument for the shipowners attempted to draw. In *Edwards* v. *Steel* (1) Lord Esher M.R. in dealing with this point said: "The next alternative is, 'or (*c*) provide him with a passage home.' Collins J. appears to have thought that a 'passage home' would include a passage to any port in the United Kingdom. I hardly think that that is the right view. If a seaman were shipped on the Clyde, could a 'passage home' mean a passage to London? I incline to think—and I state my opinion on this point, though it is not strictly necessary to decide it, because this is a test action and the parties desire to know the construction which we place upon the statute—that a 'passage home' means a passage to the port at which the seaman was shipped, or to some other port in the United Kingdom agreed to by the seaman, and that to provide him with a passage includes an obligation to provide him with reasonable maintenance during the passage." In the same case I said: "But I agree with the Master of the Rolls that a 'passage home' means a passage to the port at which the seaman was shipped, or a port in the United Kingdom to which he agrees to go. If, for instance, he was

(1) [1897] 2 Q. B. 327.

C. A. 1899

PURVES v. STRAITS OF DOVER STEAMSHIP COMPANY.

shipped at West Hartlepool, it would not do to send him back to London, unless he agrees to go there." I only wish to add that I have read the judgment of Mathew J., and entirely agree with all that he said. For these reasons I am of opinion that the appeal should be dismissed.

VAUGHAN WILLIAMS L.J. I am of the same opinion. The question is as to the meaning of the words "provide him with a passage home" in s. 186, sub-s. 2 (*c*), of the Merchant Shipping Act, 1894. I agree with the view expressed by Lord Esher M.R. and A. L. Smith L.J. in *Edwards* v. *Steel* (1), and differ from that expressed by Collins J. in the same case. One difficulty which lies in the way of the argument of the defendants' counsel is this. If the view expressed by this Court in *Edwards* v. *Steel* (1) be adopted, a very definite meaning is placed upon the words "passage home" in clause (*c*) of the sub-section, namely, that it is a short way of referring to that which has been already mentioned in clauses (*a*) and (*b*) in defining the duty of the shipowner to a seaman discharged abroad. But, if the view contended for by the defendants' counsel be adopted, it is extremely difficult to give any definition of a "passage home." When the defendants' counsel was pressed to give his definition of a "passage home," he found great difficulty in so limiting the meaning of the words as to require that the place of the seaman's destination should be a port. The meaning he sought to give to the words would seem to include the home of a seaman, even though it should be an inland home. I admit that he declined to argue in terms that the words meant that, but the arguments which he used in support of the construction which he was urging upon us would seem to involve that meaning. In my view s. 186 really contemplates only one obligation on the part of the master in cases which come within it, and the various clauses (*a*), (*b*), (*c*), and (*d*) merely provide alternative modes of carrying out that single obligation. If that view is correct, it follows that in using the words "passage home" in clause (*c*) the Legislature

(1) [1897] 1 Q. B. 712; 2 Q. B. 327.

did not intend to create a new and different obligation from that contemplated by clauses (*a*) and (*b*), but merely to provide one of several modes of carrying out the same obligation. It was asked during the argument whether, if that view were correct, there is really any difference between the modes provided for by clauses (*a*), (*b*), (*c*), and (*d*) of the sub-section. I venture to think that there is an obvious difference between the modes so provided for performing the obligation imposed by the sub-section. That obligation may, I think, be described with reference to all the clauses, when one is speaking of it generally, as an obligation to send the seaman home. Under clause (*a*) it is performed by providing him adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman. Under clause (*b*) the obligation to send the seaman home is performed by furnishing him with the means of sending him back to such a port as is described in clause (*a*), by which I understand furnishing him with the necessary cash for the purpose. Under clause (*c*) the same obligation is performed by providing him with a pass or ticket, so that he has nothing to pay, for a passage to such a port as is mentioned in clauses (*a*) and (*b*) by a ship belonging to other owners, or it may be by giving him a passage to such a port on some ship belonging to the same shipowners. Again the obligation may be performed under clause (*d*) by depositing with the consular officer such a sum of money as is by him deemed sufficient to defray the expense of such a passage. I think all those clauses merely provide different modes of carrying out a single obligation, which is to send the seaman home to the port at which he was originally shipped or some other port in the United Kingdom to which he agrees. One word with regard to the reason given by Collins J. for the opinion which he expressed in *Edwards* v. *Steel*. (1) He based that opinion upon the provisions of s. 191 of the Act. But it must be observed that the obligation created by that section is expressly confined to sending seamen in distress abroad to some port in the

(1) [1897] 1 Q. B. 712; 2 Q. B. 327.

C. A. 1899

PURVES v. STRAITS OF DOVER STEAMSHIP COMPANY.

United Kingdom or a British possession to which the seaman belongs.

ROMER L.J. I think the question which we have to decide in this case as to the construction of the Act a very difficult one, but on the whole I agree with the conclusion arrived at by the other members of the Court. It is admitted by the defendants' counsel that the word "home" as used in the Merchant Shipping Act, 1894, s. 186, sub-s. 2 (*c*), cannot mean an inland place, and therefore that it is not equivalent to the residence of the seaman, or the home address which he has to give when signing articles of agreement. I agree with the contention that it must mean some port. The word "passage" which is collocated with it tends to shew that, if there could be any doubt on the point. Taking it therefore to be clear that the word "home," as used in the sub-section, means some port, and not the residence of the seaman, it is further to be observed that the sub-section has reference only to seamen or apprentices belonging to a British ship. I think, having regard to these considerations, that the word "home" is used only in a general sense as excluding a foreign country, foreign that is to say in relation to a British ship; and I will further add that I do not think that by the word "home," as used in the sub-section, there was any intention to distinguish between Englishmen, Scotsmen, Irishmen, Welshmen, and inhabitants of the Channel Islands. The word is used I think in the general sense which I have indicated, namely, as excluding a country which is foreign in relation to a British ship. Taking it therefore in that general sense, and remembering that it must have reference to a port, is there anything in the statute from which the Court can infer the intention that the master, in applying the sub-section, should be at liberty to select the port to which the passage is to be provided, that the choice should be his only and that the seaman should have no voice in the matter? Looking at the sections of the Act to which we have been referred as a whole, I do not think that was the intention of the Legislature. The difficulty of supposing that it was is illustrated by the case which was suggested by my brother

A. L. Smith. I think that clause (*c*) of the sub-section must be construed by reference to the prior clauses (*a*) and (*b*), and that it means that the seaman is to be provided with a passage to the port in Her Majesty's dominions at which he was originally shipped or to a port in the United Kingdom agreed to by him. I see no sufficient reason for thinking that the intention was that the master should be at liberty to provide the seaman with a passage to any port he chooses which is not in a foreign country having regard to the nationality of the ship, although the seaman is not willing to go there. I think the intention was that the seaman should have some voice in the matter, but that, when he did not agree to some port in the United Kingdom, he should be sent back to the port in Her Majesty's dominions at which he was shipped.

Appeal dismissed.

Solicitors for plaintiff: *Pattinson & Brewer.*
Solicitors for defendants: *Botterell & Roche.*

E. L.

1899
June 1.

THE ATTORNEY-GENERAL *v.* THE LONDON COUNTY COUNCIL.

Revenue—Income Tax—Deduction of Income Tax from Interest or Annuities—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *Scheds. A and D—Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-s.* 3.

A county council had deducted income tax under s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, from the interest paid by them on their consolidated stock. The fund from which such interest was paid consisted partly of interest, which had been received by them on loans made by them to other local authorities, and from which, in accordance with the section, income tax under Sched. D had been deducted before payment, and partly of the rents and profits of land on which income tax under Sched. A had been paid:—

Held, that the county council were entitled to retain a proportion of the income tax which they had deducted corresponding to the proportion in which the interest on the consolidated stock had been paid out of moneys on which income tax under Sched. D had been already paid; but that they were not entitled to retain the proportion of the deducted income tax which corresponded to the proportion in which the interest on the consolidated stock had been paid out of moneys charged with income tax under Sched. A.

INFORMATION by the Attorney-General.

1. By the Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), it was, amongst other things, enacted as follows:—

Sect. 3: "After the passing of this Act the board shall not (except for such temporary period not exceeding six months as the Treasury may from time to time sanction) raise otherwise than in conformity with this Act, and with the sanction of the Treasury, any money under any powers of borrowing whether conferred by the Acts mentioned in the first schedule to this Act or otherwise howsoever."

Sect. 4: "The board, for the purpose of raising such portion of the loans authorized by the Acts mentioned in the first schedule to this Act for the purposes of those Acts as the Treasury may from time to time sanction, may create capital stock to be called the Metropolitan Consolidated Stock, in this Act referred to as consolidated stock, and to be issued in such amounts and manner, at such price and times, on such terms,

subject to such conditions, with such dividends, and redeemable (at the option of the board) at par at such times and on such conditions as the Treasury, before the creation thereof, may from time to time approve."

Sect. 5: "No holder of any portion of consolidated stock shall have any priority or preference by reason of the prior creation of such stock or otherwise, and all consolidated stock created for the purposes of the Acts mentioned in the first schedule to this Act, or of any Act hereafter to be passed, and the dividends thereon, and the sums required for the redemption thereof, shall be charged indifferently on the whole of the lands, rents, and property belonging to the board, under the Acts mentioned in the first schedule to this Act, and on all moneys which can be raised by the board by rates under this Act, and on the improvement fund, subject to all charges existing at the passing of this Act on such lands, rents, property, moneys, and fund respectively, and shall be a first charge thereon after those charges, and all moneys required for the payment of the dividends on such stock, and the sums required to be raised for the redemption of such stock as mentioned in this Act, shall be raised out of the improvement fund and Metropolitan Consolidated Rate as in this Act mentioned."

Sect. 22: "The board, for the purpose of paying the dividends on and redeeming the consolidated stock, and also of defraying the expenses authorized to be incurred and incurred by them in the obtaining or the execution of the Acts mentioned in the first schedule to this Act or any of them, and of defraying the sums required for the payment of the principal and interest of and the sinking funds for any securities granted by the board for the purposes of those Acts or any of them, before the passing of this Act, shall (in lieu of all rates or assessments authorized at the passing of this Act to be assessed by them generally over the metropolis) from time to time assess and raise a rate to be called the Metropolitan Consolidated Rate, in this Act referred to as the consolidated rate.

"Such rate shall be assessed and raised in manner provided by the Metropolis Management Act, 1855, and the Acts amending the same, with respect to the sums required for defraying the

1899

ATTORNEY-GENERAL v. LONDON COUNTY COUNCIL.

expenses of the board in the execution of that Act, and to sums assessed for the purposes of the Main Drainage Acts, and may be assessed wholly or in part in respect of expenses incurred or to be incurred, and also in respect of any unpaid balance of a former rate, and all the provisions of the Metropolis Management Act, 1855, and the Acts amending the same, concerning the estimate on which assessments by the board are to be made, and for and in relation to the assessing, raising, and enforcing payment of the sums assessed by the board, shall, subject to the provisions of this Act, extend and apply to and in the case of the consolidated rate in the same manner as if that rate were therein mentioned instead of the sums required for defraying the expenses of the board incurred in the execution of the Metropolis Management Act, 1855, and for the main drainage rate respectively.

"Every precept issued by the board for the purposes of the metropolitan consolidated rate shall specify, first, the proportion of the amount named in the precept which is required for the purpose of paying the principal and interest of and sinking fund for securities granted by them before the passing of this Act, and the dividends on and the sums required for the redemption of consolidated stock under this Act; and, secondly, the proportion of such amount which is required for all other purposes of the board.

"In making an estimate for the first-mentioned portion of the consolidated rate, the board shall compute the part required in respect of securities granted or stock issued for the purposes of the Main Drainage Acts and the Fire Brigade Act respectively.

"In making an estimate for the last-mentioned portion of the consolidated rate, the board shall not estimate the sum required for the purposes of the Fire Brigade Act as larger than a sum which would be produced by a rate of $\frac{1}{2}d.$ in the pound on the gross value of the property assessed to the metropolitan consolidated rate, and shall compute the part of the said portion of the consolidated rate required for those purposes.

"The board shall state in every precept, and shall keep a record of, all computations required to be made by this section, which record shall be open to inspection by any person on payment of

a fee not exceeding 1*s.*, and shall be conclusive for all purposes whatsoever.

"Nothing in this section shall delay or accelerate, or authorize the board to delay or accelerate, the repayment of any principal or interest of, or the providing of a sinking fund for, any securities granted by the board before the passing of this Act for the purposes of the Main Drainage Acts without the consent of the holders thereof; and while such securities remain undischarged the board shall from time to time ascertain the amount which would have been raised by the levying of the main drainage rate, and the amount which would have been so raised shall be charged on the consolidated rate, and be deemed to be from time to time payable thereout before any portion of that rate is applied to any other purpose.

"Nothing in this section shall extend to any sum levied under s. 181 of the Metropolis Management Act, 1855."

Sect. 26: "For the purpose of paying the dividends on and redeeming consolidated stock created under this Act, there shall be established a fund to be called the Consolidated Loans Fund of the Metropolis, in this Act referred to as the consolidated loans fund, and, subject to the provisions of this Act, the board shall keep a separate account of such fund."

Sect. 27: "The board shall carry to the consolidated loans fund the moneys following (after providing for all charges on such moneys existing at the passing of this Act, and to which the same shall for the time being be applicable); that is to say—

"(1.) All moneys whether in the nature of capital or otherwise arising from the sale, lease, or other disposition of lands, rents and property belonging to the board;

"(2.) The residue of the improvement fund which may come into their hands in the manner mentioned in this Act;

"(3.) Such an annual sum in every year out of the consolidated rate, and out of the contributions paid to the board in pursuance of the Fire Brigade Act, or out of one of such sources, as may be equal to two per cent. on the total nominal amount of consolidated stock, whether it has been cancelled or not; or,

"(4.) Such greater or less annual sum as the Treasury may

1899

ATTORNEY-GENERAL v. LONDON COUNTY COUNCIL.

from time to time approve as being in their opinion necessary in order to pay the dividends on and to redeem all the consolidated stock in sixty years from the date of the creation thereof."

Sect. 28: "The board shall from time to time apply the consolidated loans fund according to such regulations as may be approved by the Treasury, first in the payment of the dividends on consolidated stock, and then in one or more of the following modes, namely, in purchasing Metropolitan Consolidated Stock and in redeeming Metropolitan Consolidated Stock, and in the payment of the principal of the securities granted before the passing of this Act.

"The board may in the meantime invest such fund (subject to the said regulations) in Government securities, the interest of which and the resulting income thereof shall form part of the consolidated loans fund, and shall be applied and may be invested in the same manner.

"All consolidated stock purchased and redeemed and all securities paid in pursuance of this section shall be cancelled, and thereupon all dividends and interest in respect thereof shall be extinguished."

2. By the said Act and divers subsequent Acts of Parliament (Metropolis Money Acts) the said board and the defendant county council were empowered to lend to divers local authorities sums of money, and by the said Acts it was and is directed that the interest paid and principal repaid by the local authorities in respect of such loans shall be carried to the Metropolitan Consolidated Loans Fund.

3. The defendant council succeeded the said board on April 1, 1889.

4. By the London Council (Money) Act, 1889 (52 & 53 Vict. c. 61), it was enacted:—

Sect. 15: "Sect. 28 of the Metropolitan Board of Works (Loans) Act, 1869, is hereby repealed. The consolidated loans fund shall, subject to regulations approved by the Treasury, be first applied in the payment of the dividends on consolidated stock, and then in purchasing and redeeming consolidated stock and in payment of the principal or instalments of principal due

on securities granted before the passing of the Metropolitan Board of Works (Loans) Act, 1869, or for debts and liabilities transferred from the counties of Middlesex, Surrey, and Kent, and apportioned to the county of London under s. 40 of the Local Government Act, 1888. The council may in the meantime, and subject to regulations approved by the Treasury, invest any money for the time being forming part of the consolidated loans fund in any stocks, funds, or securities in which cash under the control or subject to the order of the Supreme Court may be invested under any order of the Supreme Court for the time being in force."

Sect. 17: "The council may from time to time within twelve months after the issue of any consolidated stock carry to the dividend account in the consolidated loans fund, for the purpose of providing for the payment of dividends on such stock from the dates fixed at the time of such issue, though the same may be earlier than the dates fixed for receiving the cash instalments on account of such loan, so much of the money arising from the issue of such stock as they may require for that purpose and as the Treasury approve, and may from time to time apply the money so carried to such dividend account to the payment of such dividends."

Provisions similar to s. 17 aforesaid are contained in divers other Acts applicable to the defendant council.

5. By the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), it is enacted (s. 24, sub-s. 3):—

"Upon payment of any interest of money or annuities charged with income tax under Sched. D, and not payable or not wholly payable out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be; and such amount shall be a debt from such person to Her Majesty and recoverable as such accordingly; and the provision contained in s. 8 of 13 & 14

1899

ATTORNEY-GENERAL v. LONDON COUNTY COUNCIL.

Vict. c. 97, now in force in relation to money in the hands of any person for legacy duty, shall apply to money deducted by any person in respect of income tax."

6. The said board and the defendant county council, from time to time being thereunto authorized by divers Acts of Parliament, raised large sums in accordance with the provisions of the said Acts hereinbefore set out. They have also lent large sums to local authorities, the interest on which and part of principal repaid are payable into the said consolidated loans fund under the enactments hereinbefore referred to.

7. The total sum paid by the defendant council by way of dividends and interest on loans made to the said board and the defendant council during the year April 1, 1897, to March 31, 1898 (inclusive), was 1,142,884*l.* 6*s.* 9*d.*, the income tax on which under Sched. D of the Income Tax Acts at 8*d.* in the pound amounts to the sum of 38,096*l.* 2*s.* 10*d.* The defendant council in paying the said dividends deduct and have deducted, and retain and have retained, the income tax payable thereon under the said Sched. D, except in the cases where the recipients of the dividends are exempt from payment of the said income tax, and excepting that the defendant council do and did not deduct or retain the tax where it amounts to fractions of a penny. The total tax not deducted during the said year, either because the recipients were exempt or because it amounted to fractions of a penny, was the sum of 1424*l.* 11*s.* 9*d.*, leaving, consequently, the sum of 36,671*l.* 11*s.* 1*d.*, as and being the sum which the defendant council had deducted and retained as and for income tax under Sched. D, payable on the dividends due to the holders of the stock created as aforesaid. The defendants have paid to Her Majesty the sums of 8490*l.* 6*s.* 8*d.* and 8217*l.* 15*s.* 2*d.* on December 23, 1897, and July 27, 1898, respectively and no more, thus leaving a balance of 19,963*l.* 9*s.* 3*d.* unpaid.

8. During the half-year April 1, 1898, to September 30, 1898 (inclusive), the defendant council paid by way of dividends and interest on loans made to the said board and the defendant council the sum of 587,055*l.* 3*s.* 8*d.*, the income tax on which under Sched. D of the Income Tax Acts at 8*d.* in

the pound amounts to 19,568*l.* 10*s.* 1*d.* In paying the said dividends the defendant council did deduct and retain the said income tax, except in cases where the recipients of the dividends are exempt from the payment of the said income tax, and excepting that the defendant council did not deduct or retain the tax where it amounts to fractions of a penny. The total tax not deducted in the said half-year, either because the recipients were exempt or because it amounted to fractions of a penny, was the sum of 721*l.* 12*s.* 6*d.*, leaving consequently the sum of 18,846*l.* 17*s.* 7*d.*, as and being the sum which the defendant council had deducted and retained as and for income tax under Sched. D. payable on the dividends due to the holders of the stock created as aforesaid. The defendants have paid to Her Majesty the sum of 7811*l.* 13*s.* 11*d.* on December 7, 1898, and no more, thus leaving a balance of 11,035*l.* 3*s.* 8*d.* unpaid.

9. The Attorney-General charges that none of the said dividends are by law payable out of profits or gains brought into charge to the income tax under Sched. D, and that the whole of the sums deducted as aforesaid are payable to and should be accounted for to Her Majesty by the defendant council.

10. The Attorney-General alternatively alleges and charges as follows: The said consolidated stock and the dividends thereon are, by virtue of the said Act of 1869 and the subsequent Acts, made a charge upon the lands, rents, and property belonging to the defendant council and their predecessors, the said board, under the Acts mentioned in the first schedule to the said Act of 1869, and on all moneys, whether in the nature of capital or otherwise, arising from the sale, lease, or other disposition of lands, rents, and property belonging to the defendant council, and upon all sums received by the defendant council from the divers local authorities to whom they have made loans under the statutes above referred to in respect of interest on or the principal of such loans, and on all moneys which can be raised by the council by rates under the said Act of 1869; that the only part of the said fund which can be brought into charge to the income tax under Sched. D of the Income Tax Acts is the interest received on loans to the said local

1899

ATTORNEY-GENERAL v. LONDON COUNTY COUNCIL.

authorities; that it is consequently only a rateable proportion of the said dividends on the said consolidated stock which can be regarded as being payable out of profits and gains brought into charge to the income tax under Sched. D; that is to say, a proportion corresponding to the proportion in which the said interest on loans to local authorities is legally applicable and applied to the payment of the said dividends or consolidated stock, and that the defendant council is bound to pay over to Her Majesty all the income tax deducted by them save that deducted on such rateable proportion as last aforesaid.

11. The Attorney-General, by way of a further alternative, alleges and charges as follows: The said consolidated loans fund has only one constituent portion which is chargeable to the income tax under Sched. D of the Income Tax Acts, namely, the said interest paid to the defendant council by local authorities on the loans made to them, and no other constituent so chargeable, and that such consolidated loans fund is by law applicable in the first place to the payment of dividends on consolidated stock and loans to the defendant council, and then in purchasing and redeeming consolidated stock and the payment of the other matters enumerated in s. 15 of the said Act of 1889, that a rateable proportion only, and no more, of the said interest payable by the said local authorities is applicable and applied to the payment of dividends on the said consolidated stock and loans to the defendant council, and that, therefore, no part of the dividends paid by the defendant council, excepting only an amount thereof equal to the said rateable proportion of the said interest, is payable out of profits or gains brought into charge to the income tax under Sched. D, and that the defendant council ought to deduct and account to Her Majesty for the whole of the income tax on the said dividends, excepting only the tax on the amount equal to the said rateable proportion of the said interest.

The defendant council averred that they had paid the sums of 1,142,884*l.* 6*s.* 9*d.* and 587,055*l.* 3*s.* 8*d.* mentioned in the information by way of dividends on consolidated stock partly out of rents and profits of lands charged with income tax under Sched. A, partly out of interest on loans to local authorities and

other interest or annual payments charged with income tax under Sched. D, and partly (that is to say, to the extent to which such receipts were insufficient) out of sums raised by rate. They contended that in so far as the said dividends were paid out of rents and profits of lands, or out of interest or other payments already charged with income tax, either by way of deduction as and when they were received by the defendant council or otherwise, the council were entitled to deduct and retain income tax on dividends paid out of such rents and profits interest and payments already charged, and that they had deducted and retained income tax on dividends so paid and no more.

The Attorney-General (*Sir R. E. Webster, Q.C.*) and *Danckwerts*, for the Crown. The county council are both a borrowing and a lending body. Interest is paid to the council by other local authorities on loans by the council to those authorities, and they, before paying such interest, deduct income tax under Sched. D. That interest, when it is received by the county council, is carried to the consolidated loans fund, out of which the county council have in turn to pay the dividends to the holders of consolidated stock. Before paying those dividends the council also deduct income tax under Sched. D, and in so far as those dividends are paid out of moneys received from local authorities by way of interest on loans it is not disputed that the county council are entitled to retain the income tax so deducted, since income tax has already been deducted from that interest by the local authorities. In other words, the Crown does not insist on the charge contained in paragraph 9 of the information. But the county council claim to retain the income tax which they have deducted not only in respect of money received by way of interest and used in paying dividends, but also in respect of all moneys carried to the consolidated loans fund from the rents and profits of land, because, as they say, such moneys have already been taxed under Sched. A. There is no power to do this. The tax under Sched. A is a tax on property, and is totally distinct from income-tax under Sched. D. The distinction is clear throughout the Income Tax Acts, and especially is seen in

1899

ATTORNEY-GENERAL v. LONDON COUNTY COUNCIL.

s. 102 of the Act of 1842 (5 & 6 Vict. c. 35) and s. 24 of the Act of 1888. In sub-s. 3 of the latter section the words "brought into charge to such tax" can only mean which have paid income tax under Sched. D, and are decisive of this point, as they cannot refer to profits or gains which have been taxed under Sched. A. As to the proportion which ought to be paid by the county council, there are two methods of arriving at it: the one as set forth in paragraph 10 of the information, by taking into account the whole amount raised by the council; the other as set forth in paragraph 11, by only taking into account the amount so raised which is paid in to the consolidated loans fund.

[They referred to *Gresham Life Assurance Society* v. *Styles*. (1)]

Sir Edward Clarke, *Q.C.*, and *Bosanquet*, *Q.C.* (*Ryde* with them), for the county council. The distinction between income tax and property tax is fallacious, and the defendants are as much entitled to retain the deducted tax in respect of moneys which they receive as profits on land and which have already been taxed under Sched. A, as they are with regard to moneys which they receive by way of interest and on which income tax has already been paid under Sched. D. Part V. of the Act of 1888 is headed "Income Tax," and s. 23 proceeds to grant "the following duties of income tax—that is to say, for every twenty shillings of the annual value or amount of property profits and gains chargeable under Sched. A" so much; thus shewing that the tax under Sched. A was regarded, not as a separate tax, but as part of the income tax. The only distinction between Sched. A and Sched. D is in the description of property from which the profits and gains arise, and this is apparent from the entire series of the Income Tax Acts and rules.

[They referred to the title and to s. 102 of the Act of 1842; to the title and to s. 40 of the Act of 1853 (16 & 17 Vict. c. 34); and to rules 1 and 10 of Sched. A.]

The Attorney-General, in reply, cited *London County Council* v. *Grove*. (2)

(1) [1892] A. C. 309. (2) (1896) 3 Tax Cases, 508.

DAY J. I am clearly of opinion that the Attorney-General is right in his contention and in his interpretation of s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888. The words "Upon payment of any interest of money or annuities charged with income tax under Sched. D and not payable or not wholly payable out of profits or gains brought into charge to such tax" make the matter abundantly clear to my mind, whether I look at the meaning of the words themselves, taking them as part of the ordinary English language, or whether I take them as interpreted by referring to the context to which they are relating. It is perfectly clear that the section is referring to moneys collected for income tax under Sched. D, and no others. Sched. A cannot be called in aid on behalf of the respondents in this case. It is clear to my mind that the county council are merely entitled to deduct income tax upon property which has been made liable to income tax under Sched. D, and not under Sched. A. Sched. A has no reference whatever to the matter. It is perfectly clear, therefore, to my mind that they are not entitled to deduct the large amount they have deducted, but are bound to account to the Crown under paragraph 11 of the information. That seems to me to be a fairer way of dealing with the moneys for the year in which they are proceeded against than paragraph 10. It was difficult at first for us to see clearly which of those two paragraphs to apply to this case; but I am quite satisfied now that paragraph 11 is the one upon which the charge should be based. We must therefore give judgment for the Crown.

LAWRANCE J. I agree.

Judgment for the Crown.

Solicitor for informant: *Solicitor of Inland Revenue.*
Solicitor for respondents: *Blaxland.*

A. P. P. K.

1899
June 2.

THE ATTORNEY-GENERAL *v.* DE PRÉVILLE.

Revenue—Estate Duty—Settled Property—Property passing on Death—Interest ceasing on Death—Surrender of Life Interest to Remainderman—Death of Life Tenant within Twelve Months—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*); *s.* 7, *sub-s.* 7.

Where the tenant for life of settled property has released the life interest in favour of the remainderman and dies within twelve months of such release, estate duty is payable by the remainderman on the principal value of the property under s. 2, sub-s. 1 (*c*), and s. 7, sub-s. 7, of the Finance Act, 1894.

INFORMATION by the Attorney-General.

1. George Thomas Mowbray of Grangewood House, in the parish of Seals, in the county of Leicester, deceased, by his will dated February 4, 1892, devised and appointed all the real estate to which he should be entitled at the time of his decease, or over which he might have any disposing power, to the use of his sister Georgiana Anne, the widow of the late Pierre Richaud de Préville, for her life, without impeachment of waste, for her separate use without power of anticipation, and after her decease to the use of his nephew, the defendant André George Richaud de Préville, the son of his said sister, and the heirs of his body, and, in default of such issue, to the testator's own right heirs for ever.

2. The said George Thomas Mowbray died on February 29, 1892, without having altered his said will except by a codicil which did not affect the above-stated devise, and administration to his estate with the said will and codicil annexed was duly granted on August 1, 1892, to the said Georgiana A. R. de Préville.

3. By an indenture of settlement dated October 10, 1845, and made between Charles Few of the first part, Thomas Mowbray and the said G. T. Mowbray of the second part, and Richard Shuttleworth Streatfield, William Henry Place, and Robert Few of the third part, the manor or lordship of Over-

seal, in the county of Leicester, and certain freehold messuages, lands, and hereditaments therein described, and situate in the parishes of Overseal and Netherseal, or elsewhere in the county of Leicester, were limited (subject to certain limitations which have ceased and to a power of appointment which was never exercised) to the use of the said R. S. Streatfield, W. H. Place, and R. Few, and their heirs, in trust to permit the said Georgiana A. R. de Préville, then Georgiana A. Mowbray, during such part of her life as she should be single or unmarried, to receive the rents and profits of the said hereditaments, and during any coverture of the said Georgiana A. R. de Préville to pay the said rents and profits to her for her separate use, and from and after the decease of the said Georgiana A. R. de Préville to the use of her first and other sons successively according to seniority in tail male, with remainders over.

4. By an indenture dated February 5, 1896, and made between the said Georgiana A. R. de Préville, widow, of the first part, the defendant André G. R. de Préville of the second part, and David Hale of the third part, reciting (inter alia) the said indenture of settlement of October 10, 1845, and will of G. T. Mowbray and his death, and reciting (as the fact is) that the defendant André G. R. de Préville was the oldest and only son of the said Georgiana A. R. de Préville, and that they were desirous of barring the estate tail of the defendant in the hereditaments comprised in the said settlement and devised by the said will, and of limiting the said hereditaments as thereinafter expressed to the intent that the life estate of the said Georgiana A. R. de Préville therein should be absolutely released in favour of the defendant. It was witnessed that the said Georgiana A. R. de Préville as settlor, and the defendant André G. R. de Préville (with the consent of the said Georgiana A. R. de Préville as protector of the settlement and will) thereby granted unto the said David Hale, first, all the manor or lordship, freehold messuages, farms, lands, tenements, and hereditaments situate in the parishes of Overseal and Netherseal, or elsewhere in the county of Leicester, comprised in the said indenture of October 10, 1845. And, secondly, all

1899

ATTORNEY-GENERAL v. DE PRÉVILLE.

the freehold messuages and hereditaments devised by the said will of the said G. T. Mowbray, save and except such part of the said hereditaments as by means of any sale, exchange, inclosure, award, or otherwise had been disposed of, and also (by way of conveyance and not of exception) all other freehold hereditaments which had become subject to the uses or trusts of the said indenture of settlement or of the said will concerning the said testator's real estate, and all moneys, stocks, funds, and securities (if any) which, or the proceeds of sale of which, were subject to be invested in the purchase of hereditaments of which the defendant André G. R. de Préville would be tenant in tail male or in tail, and the hereditaments to be purchased therewith. To hold the same unto the said David Hale and his heirs discharged from all estates in tail male or in tail of the said André G. R. de Préville at law or in equity, and all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates in tail male or in tail. To the use of the defendant André G. R. de Préville, his heirs and assigns for ever, absolutely released and discharged from the life estate therein of the said Georgiana A. R. de Préville. And it was by the indenture now in statement also witnessed that the said Georgiana A. R. de Préville thereby absolutely released unto the defendant André G. R. de Préville, his heirs and assigns, the power of appointing a life interest to any husband with whom she might intermarry, and of charging portions for her children by the said indenture of October 10, 1845, given to the said Georgiana A. R. de Préville, and all other powers, if any, by the same indenture given to or vested in the said Georgiana A. R. de Préville, to the intent that the same powers should thenceforth be absolutely extinguished and cease to be exercisable.

5. The lastly-stated indenture was enrolled in the Central Office of the Supreme Court of Judicature on February 11, 1896.

6. The said Georgiana A. R. de Préville died within twelve months after the execution of the said indenture (namely) on December 11, 1896, intestate. Letters of administration to her personal estate were granted to the defendant André G. R.

de Préville from the Principal Registry of the Probate Division of the High Court of Justice on August 9, 1897.

7. On the death of the said Georgiana A. R. de Préville, estate duty under ss. 1 and 2 of the Finance Act, 1894, became payable in respect of the hereditaments and property comprised in the said indenture of February 5, 1896 (or, alternatively, in respect of the life interest at the date of the last-mentioned indenture of the said Georgiana A. R. de Préville in the said hereditaments and property) as property passing on her death within the meaning of the said Act. The Commissioners of Inland Revenue have caused application to be made to the defendant to account for and pay such estate duty, but the defendant has refused and still refuses to do so, and he contends that no estate duty has become payable in respect of the said property or of any interest therein; but the informant charges that this contention is not well founded.

The Attorney-General (*Sir R. E. Webster, Q.C.*), *The Solicitor-General* (*Sir R. B. Finlay, Q.C.*) (*Vaughan Hawkins* with them), for the Crown. This question was left open by the decision of the House of Lords in *Attorney-General* v. *Beech*. (1) If the life tenant in this case had survived for more than twelve months after surrendering her life estate in favour of her son, that case decides that no estate duty would be payable by him on her death. But that is not so where the life tenant dies within twelve months from the surrender. By s. 1 of the Finance Act, 1894, estate duty is payable on all property "which passes on the death" of a person dying after the commencement of the Act. The House of Lords have held, however, that where a life interest has been surrendered in favour of the remainderman, no property passes on the death of the tenant for life: *Attorney-General* v. *Beech*. (1) That section is therefore insufficient; but the case is provided for by s. 2, which says that property passing on the death of the deceased shall be deemed to include certain other things. Sect. 1 goes on to provide that the duties mentioned in the first schedule to the Act shall not be levied in respect of

(1) [1899] A. C. 53.

1899

ATTORNEY-GENERAL v. DE PRÉVILLE.

property chargeable with the newly created estate duty. Among the duties mentioned in that schedule is account duty under s. 38 of the Customs and Inland Revenue Act, 1881, and s. 11 of the Customs and Inland Revenue Act, 1889. Sect. 38 of the Act of 1881 subjects to account duty any property taken under a voluntary disposition made by a person dying within three months. By s. 11 of the Act of 1889 the period of three months is extended to twelve months. By s. 2, sub-s. 1 (*c*), of the Act of 1894 estate duty is to be paid on property which would be required on the death of the deceased to be included in an account under s. 38 of the Act of 1881 as amended by s. 11 of the Act of 1889. This property, therefore, falls within that section. If the transfer had not been made the Crown would have been entitled on the death of the life tenant to estate duty on the principal value of the property at that date. By s. 2, sub-s. 1 (*b*), of the Act of 1894, estate duty is made payable on property in which the deceased or any other person had an interest ceasing at the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest. By s. 7, sub-s. 7, of the Act of 1894, the value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall, if the interest extended to the whole income of the property, be the principal value of that property. If therefore this life estate ought to be included in an account under s. 38 of the Act of 1881, the Crown is entitled to estate duty on the principal value of the property. That section was intended to subject to duty things which were not in the possession of the deceased at the time of his death. It is not denied that estate duty would have been payable in this case if the life tenant had surrendered the life estate to any one other than the remainderman, and it can make no difference that the life estate was surrendered to him. If the life tenant had assigned to the remainderman a sum of money and had died within twelve months, duty would admittedly have been payable on that sum: *Attorney-General* v. *Booth*. (1) What difference can it make that the gift was of the year's income of life estate, instead of a specific sum of

(1) (1894) 63 L. J. (Q.B.) 356.

money? At any rate, estate duty must be paid on the actuarial value of the life interest.

Butcher, Q.C., and *Ashton Cross*, for the defendant. The case is governed by the decision of the House of Lords in *Attorney-General* v. *Beech*. (1) Where a life estate is surrendered to a remainderman, nothing passes on the subsequent death of the life tenant, and there is, therefore, nothing on which estate duty can be levied. It makes no difference whether the surrender took place twelve months before the death of the surrenderor or not. The only claim now made by the Crown is that the duty is payable under the provisions of s. 2, sub-s. 1 (*c*)—that is to say, that this is property which would have been subject to account duty. Sect. 38 of the Act of 1881 was aimed, not at such things as the surrender of a life estate to a remainderman, but at absolute voluntary gifts, such as was the case in *Attorney-General* v. *Booth*. (2) As is pointed out by Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners* (3), ss. 1 and 2 of the Finance Act, 1894, are mutually exclusive. Sect. 1 deals with property passing on death, and s. 2 with property not passing on death. The only way, therefore, in which this property can be brought within the Act is by means of s. 2, sub-s. 1 (*c*), and s. 38 of the Act of 1881. The surrender of the life interest takes effect at the date of the surrender, and not at the date of the death of the life tenant. To say that it is affected by the death of the former life tenant is absurd. The only property intended to be included for account was property which ought properly to have been included for probate. A life estate which expires at the death of the life tenant cannot be valued for probate. The value must be taken at the date of the death of the deceased (s. 7, sub-s. 5, of the Act of 1894), and at that date the value of the life estate is nil. The utmost that the Crown are entitled to would be estate duty on the actuarial value of the life estate, and not to estate duty on the principal value of the property.

The Attorney-General, in reply. A life interest would be

(1) [1899] A. C. 53. (2) 63 L. J. (Q.B.) 356.
(3) [1899] A. C. 198, at p. 212.

1899

ATTORNEY-GENERAL v. DE PRÉVILLE.

included in probate. In this respect there is no difference between a lump sum and a life interest.

DAY J. In giving my judgment upon this case, I do not propose to follow in any detail the several subtle arguments which have been presented to us. I was very much impressed by the argument addressed to us by Mr. Butcher, and I was much shaken in the opinion I had previously formed; but, after hearing the Attorney-General, I think that the Crown have made out their claim, and are entitled to duty on the principal value of the property.

LAWRANCE J. I quite agree. I do not want to go fully into the sections. I agree unwillingly. That is all I can say.

Judgment for the Crown.

Solicitor for informant: *The Solicitor of Inland Revenue.*

Solicitors for respondent: *Kingsford, Dorman & Co., for Smith, Mammatt, Hale & Quarrell, Ashby-de-la-Zouch.*

A. P. P. K.

ATTORNEY-GENERAL *v.* HAY AND OTHERS.

1899
March 22.

Revenue—Estate Duty—Settled Property—Settlement of Reversionary Interest—Competency to dispose of Property during Continuance of Settlement—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*b*); *s.* 5, *sub-s.* 2.

The owner of an absolute reversionary interest in settled personal property, who during the lifetime of the tenant for life makes a settlement of his reversionary interest, reserving a life interest to himself, is a person who was "during the continuance of the settlement competent to dispose of" the property within the meaning of s. 5, sub-s. 2, of the Finance Act, 1894, and therefore upon his death estate duty is payable upon the value of his interest, notwithstanding that estate duty has previously been paid upon it at the death of the original tenant for life.

INFORMATION claiming estate duty.

By an indenture dated November 21, 1855, being a settlement made previously to and in consideration of the marriage of James Brown Alston and Elizabeth Stanwix Alston (then Hope), the said James Brown Alston assigned a sum of 3000*l.* to trustees upon trust for investment, and to pay the income thereof to the said Elizabeth Stanwix Alston for her life for her separate use, and after her decease upon trust for all the children of the marriage who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, in equal shares.

By another indenture, dated December 20, 1856, to which Elizabeth Stanwix Alston, her father, and two trustees were parties, after reciting that the father had transferred 1000*l.* Consols into the names of the trustees by way of settlement on his daughter and her issue, it was agreed and declared that the trustees should hold the said sum upon trust to pay the dividends to Elizabeth Stanwix Alston for her life for her separate use without power of anticipation, and after her decease for all or such one or more of the children or issue of the marriage as Elizabeth Stanwix Alston should by will appoint, and, in default of appointment, upon trust for all the children of the marriage who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, in equal

1899

ATTORNEY-GENERAL v. HAY.

shares, to be paid or transferred to them at such ages or times as aforesaid or on the death of Elizabeth Stanwix Alston, with the usual clause of hotchpot as regards appointed shares.

There were nine children of the marriage, of whom John Hope Alston was one. The power of appointment contained in the indenture of December 20, 1856, was never exercised. The said sum of 3000*l.* was duly invested, and the income thereof and of the 1000*l.* Consols was duly paid to Elizabeth Stanwix Alston during her life by the trustees of the respective settlements.

By an indenture dated July 28, 1888, being the settlement made in contemplation of the marriage of the said John Hope Alston with Agnes Beatrice Dumbleton, after reciting that John Hope Alston was absolutely entitled in reversion expectant upon the death of his mother to one equal ninth part of the moneys subject to the trusts of the said settlement, and that under the indenture of December 20, 1856, he was entitled in reversion expectant upon the death of his mother, and subject to the exercise of her power of appointment by will, to one equal ninth part of the moneys subject to the trusts of that indenture, the said John Hope Alston as settlor assigned (inter alia) to the defendants (the trustees of the settlement) all that his one equal undivided ninth part of and all other his share and interest in the trust funds subject to the indentures of November 21, 1855, and December 20, 1856, subject as to the premises comprised in the latter indenture to the power of appointment by will of Elizabeth Stanwix Alston and as to all the premises to her life interest therein, upon trust as to the said reversions to require the transfer or payment thereof respectively to them when and as soon as the same should fall into possession, and either to retain it in the same state of investment or to convert it into money and invest the same, and pay the income thereof during the joint lives of Agnes Beatrice Dumbleton and John Hope Alston to the said John Hope Alston, and after the death of either of them to the survivor during his or her life, and after the death of such survivor to hold the trust funds and the income thereof in trust for the children of the intended marriage as the said John Hope Alston

and Agnes Beatrice Dumbleton should by deed jointly appoint, and in default of such appointment as the survivor should appoint, and in default of such appointment in trust for all the children of the marriage who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, in equal shares.

Agnes Beatrice Alston died on October 13, 1891. Elizabeth Stanwix Alston, the mother of John Hope Alston, died on December 4, 1894, and upon her death estate duty under the Finance Act, 1894, was paid in respect of the funds comprised in the indentures of November 21, 1855, and December 20, 1856, and the funds were realized and the proceeds (after payment of such duty) distributed among the children of the marriage of John Brown Alston and Elizabeth Stanwix Alston, or those claiming under them, and the sum of 437*l.* Caledonian Railway 4 per cent. Preference Stock was in 1895 transferred by the trustees to the defendants as trustees of the indenture of July 28, 1888, in satisfaction of the one-ninth share of John Hope Alston under the settlements of 1855 and 1856. The defendants subsequently paid the income of the said 437*l.* stock to John Hope Alston during his life.

John Hope Alston died on February 20, 1897, leaving one child of his said marriage.

The Crown claimed that on the death of John Hope Alston estate duty under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, became payable in respect of the said sum of 437*l.* Caledonian Railway Preference Stock as property passing on his death. The defendants contended that no such duty became payable having regard to s. 5, sub-s. 2, of the same Act, by reason of estate duty having been paid in respect of the funds comprised in the settlements of 1855 and 1856 on the death of Elizabeth Stanwix Alston. (1)

(1) By 57 & 58 Vict. c. 30 (The Finance Act, 1894), s. 2, sub-s. 1, "Property passing on the death of the deceased shall be deemed to include the property following, that is to say: (*b.*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other

1899

ATTORNEY-GENERAL v. HAY.

The Solicitor-General (*Sir R. B. Finlay, Q.C.*) and *Vaughan Hawkins*, for the Crown. Estate duty under s. 2, sub-s. 1 (*b*), became payable on the death of John Hope Alston. He was the person who during the continuance of the settlement was competent to dispose of the property (in respect of which duty is claimed) within the meaning of s. 5, sub-s. 2, of the Act; he was undoubtedly competent to do so under the original settlements, and the fact that he subsequently chose on his marriage to make a settlement of his share of the property does not alter the fact of his competency. His reversionary interest was given to him absolutely, and his power of disposition was not cut down until the date of his own marriage settlement, when he converted his interest into a life interest. Had there been no settlement of his reversionary interest, it would have been inevitable that estate duty should be payable on his death. The settlement made upon his marriage is not the "settlement" within the meaning of s. 5, sub-s. 2, of the Act, which deals only with the original, not with the derivative, settlement of property; otherwise a series of resettlements could always defer, if not defeat, the claim of the Crown to duty.

[They cited *In re Knowles' Settled Estates* (1); *In re Du Cane and Nettlefold's Contract* (2); *In re Mundy and Roper's Contract* (3); 57 & 58 Vict. c. 30, s. 21, sub-s. 4; s. 22, sub-s. 2.]

Warrington, Q.C. (*H. Tindal Atkinson* with him), for the defendants. The "settlement" contemplated in s. 5, sub-s. 2, and the "disposition" mentioned in the introductory words of s. 5, sub-s. 1, mean that settlement (of however many deeds it may be composed) which is in operation at the date which it is material to consider—that is, in the present case, at December 4, 1894, when estate duty became payable on Elizabeth

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person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole."

By s. 5, sub-s. 2, "If estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the first schedule to this Act, be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property."

(1) (1884) 27 Ch. D. 707.

(2) [1898] 2 Ch. 96.

(3) [1899] 1 Ch. 275.

Alston's death. At that date the property was settled to her for life, then to her son for life, and then to his children absolutely. The son was not then competent to dispose of the property, and, had the Finance Act, 1894, been then in operation, settlement estate duty would, no doubt, have become payable; but in the events that have happened no further duty can become payable until the property passes to some one who is competent to dispose of it. The deeds of 1855 and 1856 cannot be looked at by themselves; they must be read in conjunction with the deed of 1888, and the three together make up the "settlement" with which the Act is concerned. In this Act "property" means that upon which duty is payable; but John Hope Alston was never competent to dispose of the property itself, but only of an interest in it which was both contingent and reversionary.

Vaughan Hawkins, in reply. The argument on behalf of the defendants gives no effect to the words "or had been at any time during the continuance of the settlement competent to dispose of the property." The mere fact of the existence of a settlement shews that only an interest in property could be disposed of, and that there could not be an uncontrolled power of disposition of the property itself. The section means that, although there may be no person competent to dispose of the property at the time when estate duty is claimed, yet, if there has been such a person since the date of the settlement, estate duty is payable; it implies that there may be a change in the interest of the parties. The section deals with one settlement only; if, however, it deals with a compound settlement, the mere execution of a derivative settlement does not make a fresh settlement within the meaning of the section; the original settlement continues in full force until its provisions are exhausted.

GRANTHAM J. I am of opinion that our judgment must be for the Crown. The difficulties which generally arise in the interpretation of the Finance Act, 1894, do not present themselves in the present case, and upon a rational interpretation of the language of s. 2, sub-s. 1, and s. 5, sub-s. 2, I think that

1899

ATTORNEY-GENERAL v. HAY.

Grantham J.

the duty here claimed is payable by the defendants. It is, of course, possible to go into the numerous decisions under the Settled Land Act, some of which have been cited to us in argument; but that Act was passed for different purposes, and its interpretation involves the application of different principles from those applicable to the Finance Act. The only safe mode of construing the latter Act seems to be to take the language of the section, and to ask ourselves whether the facts of the present case bring it within that language. I therefore put aside all extraneous principles which have been applied to the Settled Land Act, where people have endeavoured to discover methods by which they can sell properties which they could not sell unless a strained construction were put upon the language of the Act, and where the Courts have given their sanction to such methods.

Looking at the language of s. 5, sub-s. 2, of the Finance Act, it seems to me that John Hope Alston comes within that language in such a way as to entitle the Crown to our judgment. I think that during the continuance of the settlement he was competent to dispose of the property; he had a vested interest in a portion of it under the settlement of 1855, to which on his mother's death he became absolutely entitled; on his own marriage, however, he settled that portion on his wife and children. Prior to the death of his mother the Finance Act, 1894, came into operation, which provides by s. 5, sub-s. 2, that "if estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the first schedule to this Act, be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property." Suppose that he had not resettled the property upon his marriage, could it be said that the period had not arrived at which estate duty had again become payable? Was it not payable in respect thereof on the death of a person who at the time of his death was "competent to dispose of it"? If he had not resettled the property, he would have been competent to dispose of it as he pleased. But

he had resettled it, and had done so entirely of his own free will; he had been competent to dispose of it and had done so, and it seems to me that it cannot be said that the property is not liable to estate duty except on the happening of an event (which has not taken place) by which some one else became competent to dispose of it. It is true that by his marriage settlement he had divested himself of the power of disposition, but that was only after the date of the settlement under which he acquired the power. He had an absolute right to do what he liked with the property; he chose to resettle it during the existence of the prior settlement, and I see nothing to disentitle the Crown to the duty which they claim.

KENNEDY J. I am of the same opinion, and will only add a few words. The claim here made is for estate duty under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, upon the death of John Hope Alston. He was a child of Elizabeth Stanwix Alston, who was married in 1855. Upon her marriage there was an ante-nuptial settlement, dated November 21, 1855; and on December 20, 1856, there was a further settlement; the property upon which estate duty is claimed is a portion of the property which is comprised in both these documents. Under them John Hope Alston took an interest, as one of the children of the marriage, to the extent of one-ninth. Reading s. 5, sub-s. 2, in a straightforward and simple manner, it seems to me that it is the settled property in question to which it refers. Has estate duty been paid upon it? The answer is that it was paid after the death of the mother on December 4, 1894. The words of the sub-section are that no duty "shall be payable in respect thereof until the death of a person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property," and it seems to me, I confess, pretty clear that "the settlement" means the settlement under which the parties take who are referred to in the section—in the present case the settlements of 1855 and 1856. But if for any purpose we are to look at the subsequent deed as forming part of the settlement—that is, the deed by which John Hope Alston in 1888 by an ante-nuptial

1899

ATTORNEY-GENERAL v. HAY.

Kennedy J.

settlement dealt with his interest under the earlier deeds—I should be inclined to agree with the contention on the part of the Crown that we ought to go back to the earliest document as being the governing document, and to treat the others as appendages. The settlement must therefore mean the settlement, whether a deed or deeds, under which John Hope Alston derived his benefit; the last settlement was one under which he parted with his interest. And the words "competent to dispose of the property" mean, I think, competent to dispose of the property which was the settled property under these earlier deeds. Was he ever competent to dispose of such property? He was not competent to do so at the time of his death, for he had already, in his marriage settlement in 1888, himself disposed of it as far as he could do so; but prior to that settlement he was in a position to dispose of it during the continuance of the earlier settlement. Those being the facts, it seems to me to be impossible to say that the section does not carry with it the consequences for which the Crown contends.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for defendants: *Beachcroft, Thompson, Hay & Ledward.*

W. J. B.

ATTORNEY-GENERAL *v.* OWEN AND OTHERS.
ATTORNEY-GENERAL *v.* COULSON AND ANOTHER.

1899
March 21, 22;
May 17.

Revenue—Settlement Estate Duty—Bequest of Annuity—Direction to raise Portions for Grandchildren—Limitation to Persons by Way of Succession—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-s.* 1; *s.* 22, *sub-s.* 1.

A testatrix by her will bequeathed an annuity to A., and directed that a portion of her estate should be set apart to provide for the payment of the annuity, and subject thereto she bequeathed the said portion of her estate to B. :—

Held, that the property so set apart to provide for the payment of the annuity was property "standing limited to or in trust for persons by way of succession" within the meaning of s. 2, sub-s. 1, of the Settled Land Act, 1882, and that settlement estate duty was consequently payable in respect of it.

A testator bequeathed his residuary estate to trustees on trust to pay the income to his wife for life, and after her death to pay an annuity to each of his four daughters for life, and after the death of each of his daughters to raise certain named sums in trust for the children of such daughter who should attain the age of twenty-one years, or, being females, should marry under that age :—

Held, that the direction to raise the portions amounted to a limitation in favour of the testator's grandchildren to take effect upon the death of his daughters, that there was therefore a succession in respect of such portions, and that settlement estate duty was payable upon them.

INFORMATIONS on the Revenue side.

ATTORNEY-GENERAL *v.* OWEN.

Amelia Sarah Owen by her will bequeathed to her sister Emma Owen the annual sum of 105*l.* for her life, or until she should become a bankrupt or assign, charge, or incumber, or attempt or affect to assign, charge, or incumber the said annual sum or some part thereof, or should do or suffer something whereby the same or some part thereof would through her own act or default, or by operation or process of law or otherwise, if belonging absolutely to her, become vested in or payable to some other person or persons. And the testatrix directed that such annual sum was to be paid by equal monthly payments, the

1899

ATTORNEY-GENERAL v. OWEN.
ATTORNEY-GENERAL v. COULSON.

first whereof was to be paid at the expiration of one calendar month from the death of the testatrix. And she directed that if the said annual sum should cease by reason of anything aforesaid to be payable to the said Emma Owen in her lifetime, then it should be lawful for her trustees in their sole discretion to apply during the lifetime of the said Emma Owen all or any part of the said annual sum as they might think fit for the maintenance or benefit of the said Emma Owen. And the testatrix bequeathed to her servant Jemima Proctor the annual sum of 60*l.* for her life, or until she should become a bankrupt or assign, &c. (in similar terms and with similar directions to those above mentioned in the case of the bequest of the annual sum of 105*l.* to Emma Owen). And the testatrix directed that there should be set aside in the names of her trustees, from certain specified stocks or securities which she might die possessed of, sufficient capital sums to produce the said annual sums of 105*l.* and 60*l.* respectively, or that like sufficient capital sums out of her general estate should be invested in the like names in certain specified stocks or securities. Provided always and the testatrix directed that until such setting aside or investment should be made the said annual sums of 105*l.* and 60*l.* respectively should be paid and satisfied from time to time out of the income of any part of her residuary estate which should be producing income, and in default thereof, out of the capital of her said residuary estate, and, subject as aforesaid, the testatrix devised and bequeathed all the residue of her estate real and personal to her sons.

By a codicil the testatrix increased the said annuity of 60*l.* given to Jemima Proctor to 80*l.* per annum, and in other respects confirmed her will.

The testatrix died on October 31, 1896, and the will and codicil were proved by the defendants as the surviving executors on November 14, 1896, when estate duty was paid on 45,400*l.* The said Emma Owen and Jemima Proctor were still living.

The defendants administered the testatrix's estate, and set apart thereout a sum of 6210*l.* 3*l.* per cent. debenture stock of the London and North Western Railway Company standing in their names, and producing (subject to income tax) an annual

sum of 186*l.* 5*s.* to answer by means of the income thereof, and if and so far as might be necessary by means of the capital thereof, the said annual sums of 105*l.* and 80*l.* respectively, and they distributed the residue among the parties entitled thereto. The said annual sums since such setting apart continued to be paid (subject to deductions for income tax) to the said Emma Owen and Jemima Proctor respectively out of the income of the said debenture stock, but save as aforesaid the income of the said debenture stock was not paid to the said Emma Owen and Jemima Proctor respectively.

Under these circumstances the Crown claimed that settlement estate duty under s. 5, sub-s. 1, of the Finance Act, 1894, became payable on the value of so much of the testatrix's estate as was required and properly set apart to provide the said annuities. (1)

Sir R. Finlay, *S.-G.*, and *Vaughan Hawkins*, for the Crown. Where an annuity is left by will and property is directed by the will to be set aside for the payment of the annuity, and, subject to the annuity, the property set aside is given by the will to another person, the two gifts together constitute a settlement, and settlement estate duty is payable under s. 5, sub-s. 1, of the Finance Act, 1894. By s. 22, "The expression 'settlement' means any instrument whether relating to real property or personal property which is a settlement within the meaning of s. 2 of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section." And by s. 2, sub-s. 1, of the Settled Land Act, 1882, "Any . . . . instrument . . . . under or by virtue of which . . . . any land

(1) By 57 & 58 Vict. c. 30 (The Finance Act, 1894), s. 5, sub-s. 1, "Where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property,—

"(*a*) a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased; but

"(*b*) during the continuance of the settlement the settlement estate duty shall not be payable more than once."

1899

ATTORNEY-GENERAL v. OWEN.

ATTORNEY-GENERAL v. COULSON.

or any estate or interest in land stands for the time being limited to or in trust for any persons by way of succession creates or is for the purposes of this Act a settlement." Here the property in question is limited to persons by way of succession, being limited to the annuitant for life, and after her death to the residuary legatees. In *Mundy and Roper's Contract* (1) Chitty L.J., delivering the judgment of himself and Lindley M.R., said, with reference to the language of that section: "I think that according to the natural and ordinary meaning of the words they include the case of a jointure and portions for younger children limited to arise on or after the death of a tenant for life, and the terms of years limited to trustees to secure them. The jointress and the portioners take an interest in the land, and they succeed to their interests in the land on or after the death of the tenant for life." If the direction in the will were to buy an annuity it would not create a settlement, but where the direction is to set aside property to pay the annuity it does.

J. G. Wood, for the defendants. There can be no settlement where there is no gift of a life estate. An annuitant is not the owner of a life estate. An annuity is nothing more than a pecuniary legacy payable by instalments: *In re Ashwell's Will.* (2) It makes no difference that a specific portion of the testatrix's estate is set apart to provide for it, for there is no obligation to keep that fund intact and hand it over undiminished to the residuary legatees on the annuitant's death. The annuity is really charged on the corpus of the fund, and if the fund fails to produce sufficient income to pay the annuity the annuitant may resort to the corpus: *Carmichael* v. *Gee.* (3) It is analogous to the case of a jointure rent-charge; but such a rent-charge is not a life estate: it is a mere incumbrance upon the property, and a limitation of the property subject to the rent-charge does not without more create a succession of interests. In *Mundy and Roper's Contract* (1) Chitty L.J. did not say that a mere jointure created a succession. He was dealing with a case of a jointure preceded by a life estate.

(1) [1899] 1 Ch. 275, at p. 290. (2) (1859) Joh. 112.
(3) (1880) 5 App. Cas. 588.

Here the annuity is not limited after a life estate. On the other hand, Vaughan Williams L.J. in that case (1) expressed considerable doubt whether terms to secure jointures or portions or the interests thereby secured are limitations by way of succession within the meaning of s. 2 of the Settled Land Act.

Sir R. Finlay, S.-G., in reply.

Cur. adv. vult.

ATTORNEY-GENERAL *v.* COULSON.

George John Coulson by his will dated March 4, 1895, appointed his wife, his son Henry, and his daughter Gertrude executors and trustees of his will, and after certain pecuniary and specific gifts devised and bequeathed all his real and personal estate not thereby otherwise disposed of to his trustees upon trust for sale and conversion, and directed his trustees to stand possessed of the residuary trust funds and investments in trust to pay the income thereof to his wife during her life, and after her decease out of the income of the residuary trust fund, or out of the capital, if the income should be insufficient, to pay the following annuities, namely, to his daughter Alice an annuity of 300*l.* for her life, to his daughter (the defendant) Gertrude an annuity of 300*l.* for her life, to his daughter Eliza Anne Walker (wife of Thomas Sparrow) an annuity of 200*l.* for her life, and to his daughter Edith (wife of Spencer Mitchell) an annuity of 200*l.* for her life, such respective annuities to commence from the death of his wife and to be payable half-yearly; and if either of his daughters Alice and Gertrude should die without leaving issue who should live to attain a vested interest in the sum of 9000*l.* thereinafter bequeathed in trust for such issue, the testator gave to the survivor of his said last-mentioned daughters from and after the death of his widow or the death of such daughter, or such failure of her issue as aforesaid, whichever event should last happen, provided such surviving daughter should be then unmarried, an additional annuity of 300*l.* for the remainder of her life or until she should marry. And after the death of his wife and after the respective deaths of his four daughters the testator

(1) [1899] 1 Ch. at p. 297.

1899

ATTORNEY-GENERAL v. OWEN.

ATTORNEY-GENERAL v. COULSON.

directed his trustees to raise out of the residuary trust funds four several sums of 9000*l.*, 9000*l.*, 6000*l.*, and 6000*l.*, to be held on the trusts thereinafter declared; and after the death of his daughter Alice the testator declared that his trustees should raise the first-mentioned sum of 9000*l.*, and should, if necessary, invest the same and should stand possessed of the said trust premises in trust for all such one or more of the children of his said daughter Alice who being male should attain the age of twenty-one years, or being female should attain that age or marry, in such shares as his said daughter should from time to time by any deed or deeds revocable or irrevocable or by will or codicil appoint, and in default of and subject to any such appointment in trust for all or any the children or child of his said daughter who being male should attain the age of twenty-one years, or being female should attain that age or marry, if more than one equally; provided always that if any child of his said daughter should have died in her lifetime leaving issue living at her death such issue, being male and attaining twenty-one, or being female attaining that age or marrying, should take by substitution, if more than one in equal shares, the share in the said trust premises which such deceased child of his said daughter would have taken under the trusts in that behalf thereinbefore declared had he or she survived his said daughter and attained a vested interest. Provided always that no child of his said daughter who or whose issue should take any part of the said trust premises under any appointment by virtue of the power thereinbefore contained should in default of appointment to the contrary be entitled to any share of the unappointed part thereof without bringing the share or shares appointed to him or her into hotchpot; and the testator declared that, upon the failure or determination of the trusts thereinbefore declared concerning the said trust premises, the same and the income thereof, or so much as should not have been applied under the trusts of his will, should fall into the testator's residuary estate.

And the testator declared that his trustees should after the deaths of his said three daughters Gertrude, Eliza Ann Walker,

and Edith respectively raise the second mentioned sum of 9000*l.* and the said two several sums of 6000*l.*, and if necessary invest the same, and should stand possessed of the said trust premises respectively upon the like trusts and subject to the powers and provisions in favour of the issue of his said three daughters respectively and otherwise as were thereinbefore declared concerning the first-mentioned sum of 9000*l.* in favour of the issue of his said daughter Alice and otherwise. And if the survivor of his said daughters Alice and Gertrude should survive the testator's son, the defendant Henry Walker Coulson, and should die without leaving issue who should live to attain a vested interest in the said sum of 9000*l.* bequeathed in trust for the issue of such survivor, the testator directed his trustees to raise out of the residuary trust fund the sum of 9000*l.*, and bequeathed such sum in trust for such persons as such surviving daughter should by will appoint, such last-mentioned sum of 9000*l.* to be raised after the death of the testator's wife or the death of such surviving daughter or such failure of her issue as aforesaid, whichever event should last happen. And the testator declared that his trustees should stand possessed of the net residue and remainder of the said residuary trust funds in trust for his said son absolutely. And the testator authorized his trustees, at any time or times after the said several sums of 9000*l.*, 9000*l.*, 6000*l.*, and 6000*l.* should have become raisable, at their discretion to appropriate any part of the residuary trust funds (whether the same should consist of real or personal estate which should have been converted by them, or should consist of real or personal estate the conversion of which should have been postponed) in its then actual condition or state of investment in or towards the satisfaction of the said sums respectively, with power for that purpose conclusively to determine the value of the said trust premises or any part or parts as they should think fit; and the said will contained powers of investment, of postponing conversion, and of maintenance and advancement, and other usual provisions.

The testator died on July 15, 1895, and his will was duly proved by his executors on July 30, 1895.

Estate duty at the rate of 4*l.* 10*s.* per cent. was paid by

1899

ATTORNEY-GENERAL v. OWEN.

ATTORNEY-GENERAL v. COULSON.

the executors on July 27, 1895, on a net personal estate of 37,598*l.* 18*s.* 9*d.* It was alleged by the defendants that the testator left no real estate.

The said Eliza Ann Sparrow and Edith Mitchell both had issue, and the said Alice Coulson and Gertrude Coulson were still unmarried.

The testator's widow died in April, 1898.

The commissioners had called upon the executors to pay settlement estate duty under s. 5, sub-s. 1, of the Finance Act, 1894, in respect of so much of the testator's residuary estate as would be sufficient to provide the said four sums of 9000*l.*, 9000*l.*, 6000*l.*, and 6000*l.*, amounting in the whole to 30,000*l.*; but the defendants refused to pay such settlement estate duty, and contended that no settlement estate duty was payable.

The Solicitor-General (*Sir R. B. Finlay, Q.C.*) and *Vaughan Hawkins*, for the Crown. As by s. 5, sub-s. 1 (*a*), of the Finance Act, 1894, settlement estate duty is not payable where the only life interest in the property after the death of the deceased is that of a wife or husband, it is necessary here to shew that apart from the wife's life interest there is a settlement. It is clear that the gift of annuities to the daughters and the direction to raise the portions for their children together amount to a settlement. The property has in effect passed to persons who are not competent to dispose—that is to say, the daughters have in substance a life interest now that the wife's life interest is determined. The direction to raise the portions amounts to a limitation in favour of the testator's grandchildren to take effect upon the death of his daughters. The case is practically undistinguishable from that of *Attorney-General* v. *Owen*.

Robson, Q.C., and *Rowden*, for the defendants. This will does not create a settlement "by way of succession" within the meaning of s. 2, sub-s. 1, of the Settled Land Act, 1882; the portion which is to be raised after the daughter's death, and then handed over to her children absolutely, is not limited by way of succession. The wife's life interest was the only life

interest in this specific property, for she had an interest in the whole of the testator's estate; the annuitants had no interest whatever in the sums directed to be raised. The portions for the children are deferred legacies, and are not interests depending on succession at all, and this differentiates the case from *In re Mundy and Roper's Contract* (1), for here the death of the annuitant entitles her children to claim the legacy under the will, while in that case the successors succeeded to different portions of the very thing that the annuitant had enjoyed. The remarks of Chitty L.J. in that case were made with respect to landed estate, and have no application to a case like the present. The point of time to be looked at is the testator's death, and as the daughters were then alive there was no settlement of property within the meaning of s. 5, sub-s. 1, of the Finance Act, 1894, quoad these capital sums, which were not themselves in terms settled by the will. There is no necessary connection either in point of law or in point of amount between the annuity of 300*l.* to the daughter and the legacy of 9000*l.* to her children, and the suggested relation between the annuity and the capital sum is not sufficient to make the daughter a prior taker and so to constitute a succession. The 30,000*l.* directed to be raised does not exist, and if the unmarried daughters never marry 18,000*l.* of it never will exist at all, for those portions will never be raisable; the case of *Attorney-General* v. *Fairley* (2) is distinguishable, for there the daughters' shares in the fund were strictly settled upon themselves for life, and after their death in trust for their children.

The Solicitor-General in reply.

Cur. adv. vult.

May 17. The following written judgments were delivered:—

GRANTHAM J. In these cases we have to determine two questions that arise under the same section, namely, s. 5 of the Finance Act, 1894, and although the cases are apparently distinctive, the one being a simple case of an annuity, the other a case of raising portions for children and a life income for a wife,

(1) [1899] 1 Ch. 275. (2) [1897] 1 Q. B. 698.

1899

ATTORNEY-GENERAL v. OWEN.

ATTORNEY-GENERAL v. COULSON.

Grantham J.

yet the cases involve really the same question, namely, whether or not such dispositions of property by will are to be treated as settlements, and as such liable to settlement estate duty as well as to estate duty. I ought not to say that such a result could not have been intended, because I know of no one who can tell what was intended beyond a desire to sweep everything into the net of the Chancellor of the Exchequer that could be swept into it by this Act; but I am free to admit that neither in the case of annuities nor in the case of raising portions should I so find, unless I felt bound by the strict interpretation of the language of the Act, because it seems contrary to the principle on which death duties are supposed to be levied that such dispositions should be liable to a double duty; but I do feel bound so to find by what on the whole I think is the true meaning of the words, "property settled by the will of the deceased" which "passes on the death of the deceased to some person not competent to dispose of the property."

It is a great misfortune that in passing such an important Act, which remodelled all the principles on which the death duties had in the past been levied, the Legislature had not the courage to make the Act complete in itself, but adopted that most troublesome and costly plan—costly as far as litigation is concerned—of legislating in one Act by reference to sections in a previous Act, for by s. 22 of the Finance Act we are instructed to refer to s. 2 of the Settled Land Act, 1882, to find out the meaning of the word "settlement"—a simple word enough, but on the technical interpretation of which thousands of pounds may be lost or taken from an estate and a result quite contrary to the apparent intention of the Legislature brought about. The Finance Act of 1894 was only intended to deal with the duties to which property becomes liable on the death of the owner, but the Settled Land Act was not intended to deal with that question in any way, but was intended to give relief to the owners of entailed estates, and as the judges have always considered that under that Act they are bound to look to the interest of the land and the country in freeing the land wherever they can

from the devastating incubus of an impoverished owner, they strain every point they can, as was shewn in *Bruce* v. *Marquess of Ailesbury* (1), to bring every restriction on the free dealing with land within the interpretation of the word "settlement," so that the tenant for life may sell it free from its incumbrances.

We may be obliged, therefore, to decide that an estate or a bequest of money is liable to settlement estate duty because some other judges have held that a similar devolution of property enabled a limited owner to sell the property free from its liabilities. Who would have thought that by giving an annuity you would be creating a settlement and making your property liable to settlement estate duty as well as to estate duty? But I fear it is so. The property, that is, the annuity, or a sufficient portion of the corpus to meet the annuity, does pass on the death of the deceased to some person not competent to dispose of the property. It is in fact income arising from a certain portion of the residuary estate, and is property to the income of which the annuitant is entitled for life with remainder to the residuary legatee.

In reference to the second of these cases, namely, that of *Attorney-General* v. *Coulson*, I think we are almost bound by the decision of the Court of Appeal in *In re Mundy and Roper's Contract*. (2) In that case the question was not whether property was liable to duty, but whether the particular devolutions and limitations in the ownership of that property brought the property within the Settled Land Act, and so enabled the tenant for life to sell the property free from jointures and charges for younger children. Was it in fact a settlement within the terms of the Act? Chitty L.J. said (3): "The right interpretation of the words 'stands for the time being limited to or in trust for any persons by way of succession' is a critical point in this case. The words have no technical force. I see no sufficient reason for restricting their meaning. I think that, according to the natural and ordinary meaning of the words, they include the case of a jointure and

(1) [1892] A. C. 356. (2) [1899] 1 Ch. 275.
(3) [1899] 1 Ch. at p. 290.

1899

ATTORNEY-GENERAL v. OWEN.
ATTORNEY-GENERAL v. COULSON.

Grantham J.

portions for younger children limited to arise on or after the death of a tenant for life, and the terms of years limited to trustees to secure them. The jointress and the portioners take an interest in the land, and they succeed to their interests in the land on or after the death of the tenant for life. I state this proposition generally, and without reference to the Acts imposing a duty on successions; but such Acts if referred to would support this proposition." That learned judge says distinctly that the words of s. 2, to which we are referred for the definition of the word "settlement," do include the case of a jointure and portions for younger children, and I think that apart from his judgment there is less doubt as to the disposition of the property in *Attorney-General* v. *Coulson* making it liable to settlement estate duty than in the case of *Attorney-General* v. *Owen*. Looking therefore to the ordinary meaning of the words used in the Finance Act, 1894, and in the Settled Land Act, 1882, I have come to the conclusion that our judgment must be for the Crown in each case.

KENNEDY J. In the case of *Attorney-General* v. *Owen* the sole question is the liability of the defendants, the executors of the will of the late Mrs. Owen, to pay settlement estate duty under the Finance Act, 1894, s. 5, sub-s. 1, on the value of so much of the testatrix's estate as is required and properly set apart to provide two annuities bequeathed by the testatrix, one of 105*l*. to her sister Emma Owen, and one of 80*l*. to her servant Jemima Proctor. Each of the legacies is directed by the will to be paid by equal monthly payments, the first of which is to be paid at the expiration of one calendar month from the death of the testatrix. In order to produce the annuities the testatrix directed that sufficient capital funds should be set aside out of certain specified classes of investments of which she might die possessed bearing a fixed rate of income, or that sufficient capital sums out of her general estate should be invested in certain specified classes of security bearing a fixed rate of income. The testatrix further directed that until such setting aside or investment the annuities should be paid out of the income of any part of her residuary estate,

and in default thereof out of the capital of the residuary estate. Subject to these provisions the testatrix devised and bequeathed all her estate to her sons as tenants in common, with gifts over in the event of any of her sons dying in her own lifetime.

On the part of the Crown it is contended that the property passing by the residuary devise is to the extent of the annuities "settled" property within s. 5, sub-s. 1, and that therefore settlement estate duty is payable upon the value of the capital required and set aside to produce those annuities. It is contended by the defendants that settlement estate duty has not become payable because, as they argue, under the terms of this will the property is not "settled" property.

In order to see what is "settled" property within s. 5, sub-s. 1, we must turn to the definition clause of the Act, s. 22. By sub-s. 1 (i.) of that section the expression "settlement" means any instrument, whether relating to real property or personal property, which is a "settlement" within the meaning of the Settled Land Act, 1882, s. 2, or, if it related to real property, would be a settlement within the meaning of that section. Turning to that section, we find that any will "under or by virtue of which . . . . any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates, or is, for the purposes of this Act, a settlement."

Is this property required and properly set apart for the payment of the annuities, under Mrs. Owen's will, property which, according to the dispositions of the will, "stands for the time being limited to or in trust for any persons by way of succession"? Is the fact that under the will there is a certain part of the estate, the interest and income of which are diverted from the residuary legatees for the benefit of the annuitants during their life and pass upon their decease to the residuary devisees, sufficient to make the words of s. 2 of the Settled Land Act which I have quoted applicable to the present case? Or, to put the question in another way, is there in the creation of this charge upon the estate in favour of the annuitants, subject to which it is bequeathed to the residuary devisees, the

1899

ATTORNEY-GENERAL v. OWEN.

ATTORNEY-GENERAL v. COULSON.

Kennedy J.

creation of an interest which passes by way of succession? I have come, but only after considerable hesitation, to the conclusion that the question must be answered as the Solicitor-General asked us to answer it. "By way of succession" seems to me to be a phrase to which one ought, in dealing with this Act, not to assign a narrow or strictly technical meaning, but to treat it as equivalent to "successively upon death"; and substantially under the present will the property out of which the annuities are paid is property to which, so far as benefit is concerned, the annuitants are entitled during life, and which, so far as benefit is concerned, passes to the residuary devisees upon the deaths of the annuitants. There is a succession, in a popular but correct sense, in the enjoyment of this portion of the testatrix's residuary estate which comes to them upon the decease of the annuitants.

I think that the language of Chitty L.J. in the very recent case of *In re Mundy and Roper's Contract* (1) constitutes a valuable authority for this construction of s. 2 of the Settled Land Act: "the right interpretation of the words 'stands for the time being limited to or in trust for any persons by way of succession' is a critical point in this case. The words have no technical force. I see no sufficient reason for restricting their meaning." In that case the Lord Justice proceeds to hold that the words include the case of a jointure and portions for younger children limited to arise on or after the death of a tenant for life and the terms of years limited to trustees to secure them. Of course this case is not that case; but if "succession" is not to be treated as a technical or artificial term, if the substance of the thing is to be considered, it appears to me impossible to say here that in truth upon the death of each annuitant in this case the residuary devisees do not succeed to the property which under the terms of the will was first during life to be enjoyed by the annuitant. My judgment, therefore, is for the Crown.

In *Attorney-General* v. *Coulson* the same question in substance arises as in the previous case; and I see nothing in the distinctive provisions of the will to justify the application of

(1) [1899] 1 Ch. at p. 290.

any principle different from that which, for the reasons given, I have thought should be applied in *Attorney-General* v. *Owen*.

1899

ATTORNEY-GENERAL v. OWEN.

ATTORNEY-GENERAL v. COULSON.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for defendants Owen and others: *Faithfull & Owen.*

Solicitors for defendants Coulson and another: *Sole, Turner & Knight.*

J. F. C.
W. J. B.

ATTORNEY-GENERAL *v.* FURNESS RAILWAY COMPANY.

1899
March 22.

Railway—Passenger Duty—Exemption—Third-class Passengers—Extra Charge for Reserved Carriage—Railway Passenger Duty Act, 1842 (5 & 6 *Vict.* c. 79), *s.* 2, *Schedule—Cheap Trains Act*, 1883 (46 & 47 *Vict.* c. 34), *s.* 2, *sub-s.* 1.

By 5 & 6 Vict. c. 79, s. 2, and the schedule to that Act, a duty at the rate of 5 per cent. is made payable upon all sums received or charged for the hire, fare, or conveyance of passengers conveyed for hire upon any railway. By 46 & 47 Vict. c. 34, s. 2, sub-s. 1, fares not exceeding the rate of one penny a mile are exempt from duty.

A railway company, whose third-class fares did not exceed a penny a mile, abolished all its second-class carriages and fares, and in lieu of them introduced a system by which third-class passengers, after taking and paying for their tickets, could for an extra charge procure "supplementary reserve tickets," entitling them to travel in reserved third-class compartments not available for the ordinary third-class passengers who had not paid the extra charge:—

Held, that the extra sums were paid in respect of extra accommodation incidental to the conveyance of the passengers, and that the Crown was entitled to duty upon the sums received by the railway company in all cases where the sum paid for the supplementary ticket when added to that paid for the ordinary third-class ticket exceeded a penny a mile.

INFORMATION under 5 & 6 Vict. c. 79, s. 4, from which the following facts appeared.

By 5 & 6 Vict. c. 79, s. 2, and schedule, there is charged and payable to Her Majesty for and in respect of all passengers conveyed for hire upon or along any railway a duty at and after

1899

ATTORNEY-GENERAL v. FURNESS RAILWAY.

the rate of 5*l.* for 100*l.* upon all sums received or charged for the hire, fare, or conveyance of all such passengers.

The regulations for charging the duty are contained in that Act and in 10 & 11 Vict. c. 42, ss. 1, 2; 11 & 12 Vict. c. 118, s. 2; and 26 & 27 Vict. c. 33, s. 13.

By 5 & 6 Vict. c. 79, s. 4, it is enacted in effect that every railway company in Great Britain shall keep an account in such manner and form as the Commissioners of Stamps and Taxes shall direct or approve of all money received or charged daily by the company for the hire, fare, or conveyance of passengers, whether on their own railway only or on their own railway and any other railway, and in respect of all which sums of money the duties charged by the Act shall be paid by the company receiving or charging the said money, and that every such company shall deliver monthly to the Commissioners of Stamps and Taxes, or to the proper officer appointed for receiving the same, a true copy of the accounts so directed to be kept, and pay to the Receiver-General of Stamps and Taxes, or to the proper officer authorized by the said commissioners to receive the same for the use of Her Majesty, the duties chargeable under that Act in respect of the money so received or charged as aforesaid and contained in such account.

By the Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), certain alterations were made in the charge of duty, and s. 2, sub-s. 1, provides that, "Fares not exceeding the rate of one penny a mile shall be exempt from duty, but fares for return or periodical tickets shall be exempt from duty only where the ordinary fare for the single journey does not exceed that rate." By s. 8, "The term 'fare' includes all sums received or charged for the hire, fare or conveyance of passengers upon or along any railway."

The defendants the Furness Railway Company were a railway company to which the said Acts applied, and duty had been regularly charged on the fares (except so far as they were exempt under s. 2, sub-s. 1, of the Cheap Trains Act, 1883) received from passengers conveyed on that railway. The company was incorporated in 1844; the line extended a distance of 170¾ miles, and there were thirty-four passenger stations.

The third-class fares charged on the said railway had since the passing of the Cheap Trains Act, 1883, been reduced, and were now at the rate of one penny a mile.

In April, 1897, the directors of the company were proposing to abolish second-class fares and to form "third-class reserve" compartments, for which, in addition to the ordinary third-class tickets, supplementary tickets at a sliding scale would be issued, and in June, 1897, the following description of the proposed new practice was published by the authority of the directors: "The directors of the Furness Railway Company have decided to issue 'supplementary reserve tickets' to holders of third-class tickets on the following liberal terms: up to 15 miles, 3*d*. per passenger; 16 to 30 miles, 6*d*. per passenger; 31 to 50 miles, 9*d*. per passenger; 51 to 75 miles, 1*s*. per passenger; 76 to 100 miles, 1*s*. 3*d*. per passenger; 100 to 150 miles, 1*s*. 6*d*. per passenger. Return tickets are to be issued, but in order to prevent a number of these tickets remaining in the hands of the public for a length of time, they will be available on the day of issue only. A certain number of third-class compartments will have labels placed on the windows, as is now done to indicate 'smoking,' simply with the words 'reserved tickets.' All the station-masters and guards will be supplied with these labels, and the reserved compartments will be increased or diminished day by day in accordance with the requirements. This is entirely a new departure in the conduct of railway passenger business, and we trust the public will appreciate the enterprise of the company in issuing 'supplementary tickets' for the purpose of providing their customers with exclusive accommodation if they wish to have it."

The new practice of the defendants above described commenced on or about July 1, 1897, when the issue of second-class tickets was abolished, and in lieu thereof "reserved accommodation" was provided by the use of "supplementary reserved tickets," and certain third-class compartments were reserved for the holders of these tickets. In many cases the additional charge so levied brought the fare up to an amount exceeding the former second-class fares.

The defendants had not included in their returns or monthly

1899

ATTORNEY-GENERAL v. FURNESS RAILWAY.

accounts any statements of the receipts derived from the issue of "supplementary" or "reserved" tickets, and they also claimed exemption from duty in respect of receipts for third-class tickets, whether "supplementary" or "reserved" tickets had or had not been used in conjunction therewith, and they denied that the payments for "supplementary reserved accommodation" formed part of the fares, and refused to account in respect thereof.

The information prayed for—(1.) a declaration that the defendants were liable to pay duty at the rate of 5*l.* for every 100*l.* in respect of all passengers conveyed by them for hire upon or along their said line of railway upon all sums received or charged for the hire, fare, or conveyance of such passengers, including sums received or charged for what was called by the defendants "supplementary" or "reserved" accommodation, except where the total fare or sum charged or received did not exceed the limit specified in s. 2, sub-s. 1, of the Cheap Trains Act, 1883; (2.) a declaration that the defendants were not exempt from duty on receipts from tickets issued to third-class passengers for "reserved" or "supplementary" accommodation, nor from duty on receipts from other third-class tickets without due proof that such other tickets had not been issued or used in conjunction with "reserved" or "supplementary" tickets so as to make the total fare exceed the limit specified in s. 2, sub-s. 1, of the Cheap Trains Act, 1883.

The Solicitor-General (*Sir R. B. Finlay, Q.C.*) (*Vaughan Hawkins* with him), for the Crown. The test is whether the extra charge is made in respect of the conveyance of passengers, or in respect of extra individual accommodation unconnected with the conveyance of the individual. Here it was clearly a charge in respect of conveyance.

[He was stopped by the Court.]

Cripps, Q.C. (*Harold Russell* with him), for the defendants. The extra charge is not made in respect of conveyance, but is in respect of extra comfort for the individual who chooses to pay for it; what the passengers get in return for their payment is that the carriage in which they travel is not overcrowded,

and is, therefore, more comfortable for each individual passenger. It is not distinguishable from the supplying of a pillow and rug for an extra charge, in respect of which no claim for passenger duty has ever been made upon the railway companies. If the contention of the Crown is right, additional accommodation for an extra charge could never be given to a third-class passenger for fear of its being said that the third-class fare exceeded a penny a mile. It is true that in *Attorney-General* v. *London and North Western Ry. Co.* (1), where an extra charge was made in respect of the use of a sleeping-car, the decision was that the company was liable to pay duty upon such extra charge, as it was really a charge in connection with the conveyance of the passenger; but in that case there was a higher class of accommodation in the sense of a higher character of carriage in which the passenger was entitled to travel, which was very different to the present case, in which no extra accommodation is afforded by way of a better or higher class of carriage.

GRANTHAM J. I am clearly of opinion that the defendants are liable to pay the duty claimed in this information. While they may be complimented upon a reasonable effort to give extra accommodation to passengers who do not wish to pay the second-class fare, I cannot help thinking that they were probably influenced by the idea that they might by means of this alteration be able to obtain the same, or nearly the same, amount as the second-class fares without having to pay duty upon them, and that it was with that idea that they abolished second-class fares upon their line and started this plan of third-class reserved compartments. If they receive from their third-class passengers more than the third-class fare, by which I mean more than the fare of a penny a mile in respect of which they would be exempt from passenger duty under the Cheap Trains Act, 1883, I cannot see why they should be entitled to any exemption. It is suggested that the defendants would find it difficult to know the number of third-class passengers in respect of whom they had to pay the duty;

(1) (1881) 6 Q. B. D. 216.

1899

ATTORNEY-GENERAL v. FURNESS RAILWAY.

Grantham J.

but by the system of a coupon with a counterfoil the fares would be easily checked; at any rate, machinery might easily be devised to meet this difficulty. In my opinion the extra charge is made in this case in respect of the conveyance of the passenger, and not in respect of the personal individual benefit of any particular passenger, as by supplying him with a rug or a pillow for the journey. The extra charge made entitles all who choose to pay it to use a particular carriage with extra accommodation; it is made in respect of the conveyance of a passenger from one station to another, and it is therefore in my opinion clearly made as part of the fare for such conveyance.

KENNEDY J. I am of the same opinion. In substance the result of this system is to create an intermediate class of conveyance, although the second-class fare has been in name abolished. In *Attorney-General* v. *London and North Western Ry. Co.* (1) Kelly C.B. said in the Court below: "There might be a matter of some nicety if what is supplied were something clearly apart and different from the usual accommodation of a railway company, such, for instance, as providing a dinner or something else which really was not in any sense necessary to or connected with the passage." These remarks are entirely applicable to the present case. An extra charge in respect of the right to travel in a compartment which is more comfortable than the ordinary compartment, and which is reserved for the passengers who choose to pay for it, is clearly a payment made in connection with the conveyance of the passenger.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Currey, Holland & Currey.*

(1) (1880) 5 Ex. D. 247.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1899
June 6.

PRESCOTT, APPELLANT; LEE, RESPONDENT.

Parliament—Franchise—Occupiers' List—Notice of Objection—Power of Amendment—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 2.

The mistakes in notices of objection which a revising barrister is empowered to correct under s. 28 of 41 & 42 Vict. c. 26, include mistakes of law.

In a notice of objection to the retention of a person's name on the occupiers' list of voters in a borough the objector described himself as "on the list of parliamentary electors and burgesses" for a certain parish in the borough, but incorrectly inserted as his place of abode his shop, which was his qualifying property, and at which, though he spent the greater part of the day there, he did not reside. His reason for so doing was that his shop was situate in the borough and his place of abode was at some distance from the borough, and he thought he ought to give his address within the borough. No one was misled by the misstatement:—

Held, that the misstatement of the place of abode was a mistake which the revising barrister had power to amend.

Decision of the Divisional Court, [1899] 1 Q. B. 102, affirmed.

APPEAL from the decision of a Divisional Court, on a case stated by a revising barrister, reported [1899] 1 Q. B. 102.

At a court held for the revision of the lists of voters for the parliamentary borough of Strand, Francis C. Hunt objected to the name of Thomas Prescott being retained on Division I. of the occupiers' list of voters for the parish of St. Martin-in-the-Fields in the borough.

The objection was good in substance and was duly served, and was correct in form except that the place of abode of the objector was incorrectly given. The objection was signed "Francis C. Hunt of 106, Drury Lane." The objector's true place of abode was 50, Nelson Road, Wimbledon. The address 106, Drury Lane was inserted by a mistake on the part of the objector, who thought that he ought to give his address within the borough, and not an address outside the borough. The address 106, Drury Lane was the objector's qualifying property in the borough, and was a shop in which he could be found

C. A. 1899

PRESCOTT v. LEE.

during the greater part of every week-day. The objector's place of abode was stated in the second column of the overseer's list as 50, Nelson Road, Wimbledon. Neither the appellant Thomas Prescott nor any one else was affected in any way by the incorrect statement of the objector's place of abode.

The revising barrister amended the objection by adding the words "and of 50, Nelson Road, Wimbledon," and he struck out the name of Thomas Prescott from the list, subject to a case for the opinion of the Court.

The Divisional Court affirmed the decision of the revising barrister. (1)

The appellant Thomas Prescott appealed from this decision.

Daldy, for the appellant. This is not a case of an insufficient description, but of an erroneous one. The objector has not complied with the requirements of the form by inserting his place of abode. What he did was done deliberately, and cannot be amended under the power given to amend a mistake: *Smith* v. *Chandler*. (2) In *Adams* v. *Bostock* (3) the objector omitted his place of abode, and the Court held that this was a mistake which could be amended; but it is submitted that that case went too far. This notice is altogether bad, and the defect is not a mistake and cannot be amended, as it arose from a mistaken view of the law: *Bridges* v. *Miller*. (4) [He also cited *James* v. *Howarth* (5); *Freeman* v. *Newman* (6); *Humphrey* v. *Earle* (7); *Wood* v. *Chandler*. (8)]

Lawless, for the respondent, was not called on.

LINDLEY M.R. Personally I entertain not the slightest doubt as to this case. To determine the point we must look at the Act which gives power to amend. The Act applicable is the Parliamentary and Municipal Registration Act, 1878. Under s. 28, sub-s. 2, a revising barrister has power to correct "any mistake which is proved to him to have been made in any claim or notice of objection." The revising barrister has

(1) [1899] 1 Q. B. 102.
(2) (1888) 22 Q. B. D. 208.
(3) (1881) 8 Q. B. D. 259.
(4) (1887) 20 Q. B. D. 287.
(5) (1879) 5 C. P. D. 225.
(6) (1883) 12 Q. B. D. 373.
(7) (1887) 20 Q. B. D. 294.
(8) (1887) 20 Q. B. D. 297.

found that the objection to the name of the appellant being retained on the occupiers' list of voters was good in substance and was duly served and was correct in form, except that the place of abode of the objector was incorrectly given. The objector did not put in the notice his place of abode, which was out of London, but he inserted his business address, which was within the borough. The revising barrister saw, as we can see, how that came about. The form of objection was printed. It shewed that the objector was to sign, and there was the word "of" and a space was left to be filled up. He filled in the blank by putting 106, Drury Lane, which was his place of business but not his place of abode. The revising barrister has found as a fact that no one was misled by what was done, and he amended the notice by putting in the real place of abode of the objector.

The question is whether he had power to do this. The majority of the Divisional Court held that there was such power, but my brother Wills dissented from this view. Having read his judgment, I am unable to concur in it. The case seems to me to be an easy one to decide. In the first place, the amendment is in the discretion of the revising barrister, and in construing an Act giving power to correct a mistake the Courts should be slow to hold that the revising barrister was wrong in the way in which he has exercised his discretion. An objection to the decision of the revising barrister can only be supported on the ground that he had no power to act as he did. On this matter we put it to counsel that we should like to hear any authority to shew that there was no such power. Among a number of cases two were cited as bearing on this point. In *Bridges* v. *Miller* (1) the Court held that there was no power to amend so as to turn what was really a bad objection into a good one. That is an intelligible decision, but it does not apply in the present case. *Smith* v. *Chandler* (2) was a case of a notice of claim by a lodger claimant which was bad. Whether it could have been amended I do not know, because I have not sufficiently examined the provisions as to lodger votes. But the ratio decidendi was that there was a rival form

(1) 20 Q. B. D. 287. (2) 22 Q. B. D. 208.

C. A. 1899

PRESCOTT v. LEE.

Lindley M.R.

intentionally used by the agents who would not use the parliamentary form, and that which they used was clearly bad. Here there is a good objection, and, if the objector had given his right address, one to which the revising barrister must have given weight. I entertain no doubt that in this case there was power to amend, and the appeal must be dismissed.

A. L. SMITH L.J. In this case we have a notice of objection in which everything is in order except a blunder as to the address of the objector which deceives no one. Under the statute the revising barrister may amend any mistake in a notice of objection. Why should that general power given by the Legislature be cut down by the Court to the amendment of some mistakes only? A revising barrister would not amend a notice if some injustice might follow from his doing so; but I cannot see why we are to cut down his power of amendment to something less than that specified by the Act when no one is deceived by the mistake made. As I understand, my brother Wills agrees with this view, but thinks that what was done here was not a mistake because it was done on purpose. It seems to me that it was a mistake all the same, because the objector thought that the blank should be filled in with his address as it appeared on the list, and accordingly he put in that address instead of his place of abode. I agree with the majority of the Divisional Court that it was a mistake which was made and that it was within the powers of amendment given by 41 & 42 Vict. c. 26, s. 28, sub-s. 2.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors for appellant: *Ayrton, Briscoe & Barclay.*
Solicitors for respondent: *Troutbeck & Co.*

A. M.

ELLIOTT *v.* LONDON COUNTY COUNCIL.

1899
June 12.

London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 86—*Wooden Structure —Licence of County Council—Exemption—Structure Used in Connection with Traffic of Railway Company.*

The appellants, coal merchants, were in the habit of having coal consigned to them by railway to London, where it was delivered to them at a wharf in the coal yard of the railway company. By the permission of the railway company the appellants erected in the coal yard a small wooden structure which they used as a coal office. The use of this coal office by the appellants was a matter of convenience to the railway company in that it contributed to the speedy clearing of the coal trucks from the company's sidings:—

Held, that the structure in question was "used in connection with the traffic of the railway company," within the meaning of s. 86 of the London Building Act, 1894, and that its erection did not require the licence of the respondents under s. 84.

Case stated by a metropolitan police magistrate.

The appellants were summoned under s. 84 of the London Building Act, 1894, for having unlawfully set up a wooden structure to which Part VII. of the Act applied without having first obtained a licence from the respondents. At the hearing the following facts were admitted or proved:—

The appellants are coal merchants and coal agents carrying on business at 50, Grove Road, Marylebone, and elsewhere, and are in the habit of having large quantities of coal consigned to them at their wharf in the coal yard and depot of the Great Central Railway Company in Carlisle Street, Marylebone, such coal being carried thereto from the coalfields, whence it is brought by the railway company.

The yard extends over an area of five acres or thereabouts, and the premises are the exclusive property of the railway company. The arrangement and disposition of the yard is such that the lines of the railway company are connected with a number of sidings on to which the trucks of coal after arrival at the depot are shunted. In response to an application for accommodation made to the railway company by the appellants, amongst other coal merchants, the railway company have

1899

ELLIOTT v. LONDON COUNTY COUNCIL.

allowed certain structures to be placed at the inner end of each siding, the structures being built in the same way and of the same materials and occupied upon the same terms as the structure in the summons referred to. The said structure is occupied by the appellants and is used solely by and for the purposes of the appellants and their servants, and is not used by or for the purposes of the railway company. The other structures are used and occupied by certain coal merchants at the said coal yard for the same purposes, and are held by them on the same conditions in regard to the railway company as in the case of the appellants.

On or about August 9, 1898, the appellants, having received permission from the railway company so to do, caused to be erected at their own expense on the premises of the railway company, in accordance with plans supplied to them by the railway company, at a point just within the entrance-gate of the coal yard, the structure in question, which was 11 ft. 9 in. long by 6 ft. 9 in. wide, by 8 ft. 9 in. high, and was made of wood. It is occupied by the appellants as a coal office in connection with their wharf upon the company's premises, for the purpose of receiving and executing orders for, and distributing to small dealers and to consumers, the coal consigned to the appellants at their wharf and carried there by the railway company. The structure is removable at the will of the railway company. Upon the arrival of coal at the coal yard, the merchant to whom it is consigned is at once informed by the railway company of its arrival by means of an advice-note delivered by the railway company by hand at the said structure within the yard occupied by the merchant, and notice is given to him that the trucks of coal must be unloaded at once, and that after six clear days siding rent at the rate of 6*d.* per truck per day will be charged until the trucks are released. When a customer comes to the yard for coal a ticket is given to him by the coal merchant from whom he has purchased the coal. One portion of the ticket contains instructions to the coal merchant's men at the wharf or siding where the coal is stored to load for the customer the quantity of coal specified on the face of the ticket. After the merchant's men have loaded the specified quantity,

his foreman at the wharf or siding fills up and hands to the customer the other portion of the ticket, which is addressed to and has to be presented to the clerk in charge of the railway company's weigh-bridge in the yard (such clerk being an employee of the railway company) before the customer's cart or wagon can leave the yard, which portion of the ticket shews the amount of coal loaded for the customer and which he is entitled to take out of the yard. The customer's cart or wagon on first going into the yard is weighed at the weigh-bridge of the railway company before loading commences, in order to ascertain the tare; a record is made of this, and when the cart or wagon is loaded and ready to leave the yard it has to pass over the weigh-bridge again so that the railway company may know that the particular customer is only taking away the amount of coal to which he is properly entitled, and so that the unauthorized removal or purloining of coal may as far as possible be prevented. It is convenient to the appellants and the railway company for the proper conduct and management of the business between them in connection with the appellants' share of the coal traffic of the railway company that the appellants should have, in close proximity to the point where the railway company deliver the coal, a structure in the nature of an office where they can dispose of their clerical business in connection with (*a*) the delivery of coal to them by the railway company; (*b*) the speedy clearing of coal from the wharf near the sidings of the railway company, which is a matter of importance both to the coal merchants and the railway company, the former desiring to avoid the payment of a siding rent in respect of uncleared trucks, and the latter desiring their trucks to be cleared and available for use again as soon as possible; (*c*) the receipt of the orders for the sale of coal; and it is more convenient for the conduct of the business that the office should be situate on the premises of the railway company and within the yard than outside it. There would probably be no further use for the said structure if for any reason the coal traffic of the railway company were to come to an end, or if the appellants ceased to have coal consigned to them by the railway company's line.

1899

ELLIOTT v. LONDON COUNTY COUNCIL.

On these facts it was contended for the appellants that the structure so erected by them was used "for the purposes of or in connection with the traffic of the railway company" within the meaning of s. 86 of the London Building Act, 1894, and was therefore exempt from the operation of s. 84.

The magistrate held that it was not so used, and he accordingly convicted the appellants, subject to a case for the opinion of the Court.

C. A. Russell, Q.C., and *Lewis Coward*, for the appellants. The use of the office, if not for the purposes of the railway company, was, at all events, in connection with the railway traffic. The finding of the magistrate to the contrary is inconsistent with his finding that the use of the office by the appellants facilitated the delivery of the coal and the release of the trucks. The office had no reason for its existence except in connection with the company's traffic.

Avory and *Daldy*, for the respondents. The exemption in s. 86 is only intended to apply to structures used by the railway company itself. The railway company has nothing to do with distributing the coal. The traffic is at an end when it is delivered at the sidings. The mere fact that the use of the structure is beneficial to the railway company does not shew that it is used for their purposes. In *Coole* v. *Lovegrove* (1), where a canal company let a building on one of their wharves to an institution for distributing firewood as a place to chop firewood in, and by the terms of the agreement between the company and their tenants all the wood required by the latter was to be brought to the building by the company's canal, it was held that, notwithstanding that the company were paid tolls for the passage of the wood over the canal, the building was not "used for the purposes of the canal" within the corresponding section of the Metropolitan Building Act, 1855. Similarly, in *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Barnsley Union* (2), where a railway company erected upon their premises certain dwelling-houses for their servants whose duties required them to live upon the spot, it was held

(1) [1893] 2 Q. B. 44. (2) (1892) 67 L. T. 119.

that the buildings were not "used for the purposes of the railway."

DAY J. I have no doubt that the magistrate in this case was wrong in the conclusion at which he arrived, and that the appeal must be allowed. It seems to me to be clear that this structure which was erected on the premises of the railway company is used in connection with the traffic of the company. It has no other reason for its existence. It is, therefore, exempt from the operation of the part of the Act under which the licence of the county council to the erection of wooden structures is required.

LAWRANCE J. I am of the same opinion. The magistrate has found that it is convenient to the appellants and the railway company for the proper conduct and management of the business transacted between them that the appellants should have in close proximity to the point where the railway company deliver the coal a structure in the nature of an office wherein they can dispose of their clerical business in connection with (*a*) the delivery of coal to them by the railway company, and (*b*) the speedy clearing of coal from the wharf near the sidings of the railway company, which is a matter of importance to the coal merchants and the railway company, the former desiring to avoid the payment of a siding rent in respect of uncleared trucks, and the latter desiring their trucks to be cleared and available for use again as soon as possible. That finding seems to be conclusive of the question. The cases cited in argument are wholly different. In *Coole* v. *Lovegrove* (1) the question was whether a building erected upon a wharf belonging to a canal company, and let to tenants who used it for the purpose of chopping firewood, was used for the purposes of the canal merely because by the terms of the tenancy all wood required by tenants was to be brought to the building by the company's canal. The case only wanted stating to shew that it was not. In the *Manchester, Sheffield and Lincolnshire Ry. Co.'s Case* (2) it was equally obvious that buildings erected by

(1) [1893] 2 Q. B. 44. (2) 67 L. T. 119.

1899

ELLIOTT v. LONDON COUNTY COUNCIL.

Lawrance J.

the company as dwelling-houses for their servants were not used for the purposes of the railway. Moreover, the language of the statute in the present case is different; it extends not only to structures used "for the purposes of the railway company," but also to those used "in connection with the traffic" of the company. The coal office here was clearly used in connection with the traffic. It was an object of the company to have some representative of the coal merchants on the spot, so that the trucks might be discharged as quickly as possible in order to make way for others. The appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Cunliffes & Davenport.*
Solicitor for respondents: *Blaxland.*

J. F. C.

C. A.

1899

July 5.

[IN THE COURT OF APPEAL.]

SHAW *v.* HERTFORDSHIRE COUNTY COUNCIL.

Public Authority, Action against—Costs—Taxation—"Judgment obtained" by Defendants—Consent Order dismissing Action with Costs—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*b*).

In an action against a county council for acts done by them in pursuance of the Local Government Act, 1894, an order was made in chambers by consent that the action be dismissed, and that the plaintiff do pay to the defendants their taxed costs of the action:—

Held, that the defendants had obtained judgment within the meaning of s. 1 (*b*) of the Public Authorities Protection Act, 1893, and that the costs must therefore be taxed as between solicitor and client.

APPEAL by the defendants against an order made by Channell J. in chambers.

The plaintiff was the owner of some houses and land which abutted on a public highway, called Shenley Road, at Elstree, in Hertfordshire. The writ was issued in the Queen's Bench Division. By her statement of claim the plaintiff alleged that the defendants, by their servants and agents, had trespassed

on her land, and thrown down her fences. And the plaintiff claimed 500*l.* damages, and an injunction restraining the defendants from continuing to trespass upon her land.

By their defence the defendants justified the acts of which the plaintiff complained, as being a removal of an obstruction of and encroachment upon the highway in the exercise of their powers under the Local Government Act, 1894.

An action in the Chancery Division was also commenced by the Attorney-General (at the relation of the county council) against the plaintiff, claiming (1.) a declaration that certain land was part of the said public highway; (2.) a mandatory injunction requiring the plaintiff to abate her encroachment, and to remove certain fencing; (3.) an injunction restraining her from encroaching upon or inclosing any part of the highway.

Before the action in the Queen's Bench Division could come on for trial, an agreement for the compromise of both actions was made between the parties. One of the terms was in effect that the highway should be defined as including something less than what the county council had claimed, and that the declaration and injunctions claimed in the Chancery Division action should be modified accordingly. The Queen's Bench action was to be dismissed with costs, and the plaintiff was to pay the defendants' costs of the Chancery Division action.

Accordingly, upon a summons in chambers in the Queen's Bench action, the following order was on January 12, 1899, made by a master: "Upon hearing the solicitors on both sides and by consent it is ordered that this action be dismissed, and that the plaintiff do pay to the defendants their costs of this action to be taxed."

On February 4, 1899, upon motion for judgment in the Chancery Division action in default of defence, judgment was given by Romer J. by consent in accordance with the compromise, the judgment including an order that the defendant should pay to the relators their own and the plaintiff's taxed costs of the action. Under the consent order in the action in the Queen's Bench Division, the county council claimed to have their costs taxed as between solicitor and client as provided by

C. A. 1899

SHAW v. HERTFORDSHIRE COUNTY COUNCIL.

s. 1 (*b*) (1) of the Public Authorities Protection Act, 1893. The plaintiff contended that the costs ought to be taxed as between party and party.

The master was of opinion that the consent order was not a "judgment obtained" by the defendants within the meaning of the section, and that the costs must be taxed as between party and party only. The matter was referred to Channell J., who affirmed the master's decision, but on the ground that under the circumstances the parties must be taken to have intended that the costs should be taxed as between party and party. The county council appealed.

Danckwerts, for the appellants. The order is really a judgment in the action, and it must mean that the defendants are to be paid such costs as the law awards to them, i.e., by s. 1 (*b*), costs as between solicitor and client. That section gives the costs as between solicitor and client as a matter of right, and the Court has no discretion in the matter. In agreeing to the compromise the defendants meant that the costs should be taxed on that footing, and, whatever the plaintiff or her solicitor may have thought about it, there was no agreement that the costs should be only as between party and party.

A. G. McIntyre, for the plaintiff. The consent order is not a "judgment" within the meaning of the section. It is not drawn up in the form of a judgment in the Queen's Bench Division. The word "judgment" in the section means a judgment in an action carried on to trial in which a judgment is solemnly pronounced by the Court. This order resembles an order dismissing an action for want of prosecution. The objection may be a very technical one, but the section ought to

(1) By s. 1, "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:—(inter alia) (*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

be construed very strictly as against a public authority. The distinction between an "order" and a "judgment" is well recognised: *Onslow* v. *Commissioners of Inland Revenue.* (1)

[LINDLEY M.R. Could not the order be pleaded as res judicata?

Danckwerts referred to *In re South American and Mexican Co.* (2)

ROMER L.J. In the Chancery Division a judgment for the defendants would be in this form: "It is ordered that the action be dismissed." Can it make any difference with regard to s. 1 (*b*) whether the judgment is drawn up in the one Division or the other?]

But in such a case the action would be tried out in open court and the judgment then pronounced, and there would be an adjudication upon the issue between the parties.

[ROMER L.J. referred to Order XIV., r. 7, and Order XXV., r. 3.]

Under those rules a formal judgment would be signed. A judgment could not be drawn up on this consent order.

[ROMER L.J. Because it is a judgment.]

It was not intended that it should be a judgment. The learned judge allowed the plaintiff's solicitor to state that he intended to consent only to the payment of party and party costs.

Danckwerts referred to *North Metropolitan Tramways Co.* v. *London County Council* (3); *Fielding* v. *Morley Corporation.* (4)

LINDLEY M.R. We have consulted our colleagues in the other Court of Appeal, and they both agree with us that this consent order is a final "judgment." In a case to which s. 1 (*b*) applies it makes it imperative that the costs should be taxed as between solicitor and client. The defendants have, it is true, obtained a judgment by consent, but still they have "obtained judgment." That judgment carries with it costs as between solicitor and client, unless it is otherwise agreed between the parties. It is very likely that the plaintiff's solicitor only

(1) (1890) 25 Q. B. D. 465.
(2) [1895] 1 Ch. 37.
(3) [1898] 2 Ch. 145.
(4) [1899] 1 Ch. 1.

C. A. 1899 SHAW v. HERTFORDSHIRE COUNTY COUNCIL.

intended to consent to costs as between party and party—probably this Act was not present to his mind—but there is no evidence of any agreement that the costs should be limited in that way. The appeal must succeed, but the costs of it which the plaintiff must pay will be as between party and party, not as between solicitor and client. Sect. 1 (*b*) does not apply to the costs of an appeal.

ROMER L.J. I agree.

Appeal allowed.

Solicitors: *J. N. Mason & Co., for C. E. Longmore, Hertford; Paterson, Sons & Candler.*

W. L. C.

C. A. 1899 *June* 6.

[IN THE COURT OF APPEAL.]

WALSHAW *v.* MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF BRIGHOUSE.

Local Government — Offences — Unwholesome Meat — Damage by Reason of Seizure — Costs of Summons — "Full Compensation" — Arbitration — Findings of Arbitrator—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117, 308.

Meat belonging to the plaintiff and alleged to be unwholesome was seized by the inspector of nuisances of the defendant corporation and condemned by a magistrate. The owner was proceeded against, but the summons was dismissed by the justice for a defect in form, and no order was made as to costs. On an arbitration under the Public Health Act, 1875, the arbitrator found that the meat was sound, and awarded the plaintiff compensation. In an action on the award:—

Held, that the finding of the arbitrator as to the soundness of the meat was conclusive; that the corporation were liable to pay to the plaintiff full compensation for the damage sustained by reason of the acts of the officer of the corporation; and that such full compensation included the costs to which the plaintiff was put in opposing the summons.

APPEAL from a judgment of Day J. at the trial of the cause without a jury.

The action was brought on an award made under the Public Health Act, 1875, under the following circumstances. The inspector of nuisances of the defendant corporation inspected

a carcase, the property of the plaintiff, and pronounced it to be unsound. His opinion was confirmed by the medical officer of health, upon whose order the carcase was seized and taken before a justice of the peace, who condemned the meat and ordered it to be destroyed. Subsequently a summons was taken out on the information of the medical officer of health against the plaintiff, which was dismissed at the hearing for a defect in form, no order being made as to costs. No further proceedings were taken against the plaintiff. The plaintiff gave notice to the defendants that he required them to compensate him for the damage he had sustained by reason of the seizure of the meat. He appointed an arbitrator, but the defendants failed to appoint one, and the arbitration proceeded before the arbitrator appointed by the plaintiff. The defendants attended the reference and called evidence to prove that the meat was unsound. The arbitrator found as follows:—

(1.) That the seizure and condemnation of the carcase was made as alleged.

(2.) That the magisterial information was laid and dismissed as alleged.

(3.) That the carcase was not diseased or unsound or unwholesome or unfit for the food of man when the order to destroy the same was made.

(4.) That the carcase, when the same was ordered to be destroyed, was sound, wholesome, and fit for the use of man.

(5.) That the owner of the carcase (the plaintiff) had, by reason of the exercise of their powers by the corporation under the Public Health Act, 1875, sustained damages as follows: 7*l.* 10*s.* by loss of the carcase, 37*l.* 1*s.* expenses of and incident to defending himself in the magisterial proceedings, 52*l.* loss on his business which immediately and necessarily followed from the seizure, condemnation, and magisterial proceedings; and he awarded the sum of 96*l.* 11*s.*

An action was brought on the award, and at the trial the defendants contended that the award should not have determined the question of liability, but only the question of the amount of compensation, and that it was bad for excess, and they tendered evidence for the purpose of shewing that the

C. A. 1899

WALSHAW v. BRIGHOUSE CORPORATION.

meat was unsound. The learned judge refused to admit this evidence, and gave judgment for the plaintiff.

The defendants appealed.

Macmorran, Q.C., and *T. R. D. Wright*, for the defendants. The duty of an arbitrator under s. 308 of the Public Health Act, 1875, is confined to determining a dispute as to the fact of damage and the amount of compensation. He has no power to determine the question of liability or the question whether the matter was one as to which the complainant was not himself in default. The award was therefore bad for excess. Further, it was open to the defendants at the trial to controvert the facts found by the arbitrator, and the learned judge ought not to have excluded the evidence tendered by them to shew that the meat was unsound. The condemnation of the meat was not the act of the corporation, and the plaintiff might have appealed on that matter to quarter sessions. The only exercise of the powers of the Act by the defendants was the seizure of the meat. Taking out a summons against the plaintiff was not an exercise of the powers of the Act, and any one might have taken out such a summons. The justices before whom the summons was heard might have made an order as to costs, but they did not, and those costs do not come within the expression "full compensation" in s. 308, that expression applying only to the damage arising from the seizure of the meat. Sect. 308 was intended to supply a remedy to a person who has suffered damage where no other remedy existed; so that if the Public Health Act does not take away the right to bring an action for these costs, s. 308 does not apply to them.

[They cited *Brierley Hill Local Board* v. *Pearsall* (1); *Bater* v. *Birkenhead Corporation* (2); *Waye* v. *Thompson*. (3)]

Scott Fox, Q.C. (with him *W. J. Waugh, W. Madden*, and *G. P. Walker*), was not called on.

A. L. SMITH L.J. I am of opinion that this appeal should be dismissed. The action was tried before my brother Day,

(1) (1884) 9 App. Cas. 595. (2) [1893] 2 Q. B. 77.
(3) (1885) 15 Q. B. D. 342.

and the question arises in this way. The sanitary inspector, an officer of the defendant corporation, inspected some meat which was owned by the plaintiff, and called in the medical officer of health, another officer of the corporation, to inspect it also. They came to the conclusion that it was unfit for human food; and thereupon it was seized and brought before and condemned by a magistrate. There was later on a summons against the owner of the meat, but that was dismissed, not on the merits, but on a technical objection to the form of the summons. Nothing was said about costs, and there were no further proceedings taken against the owner; but he preferred a claim against the corporation on the ground that he had sustained damage by reason of the exercise by them of their powers under the Public Health Act, 1875, in relation to a matter as to which he was not in himself in default, and was therefore entitled under s. 308 to full compensation. Under the provisions of the Act the matter went to arbitration. The corporation did not appoint an arbitrator, so that the arbitration came before the arbitrator appointed by the plaintiff. The corporation attended the arbitration, and, in answer to the case set up by the plaintiff that the meat was sound, they called a large body of evidence to shew that it was unsound. The result was an award with a finding as to certain facts, and, in my opinion, the arbitrator was right as to the form in which he drew up his award. He did not draw his award finding that the local authority was liable, which would clearly have been wrong; but he found facts, so that when an action was brought on the award it might be determined by a court of law whether or not, upon those facts, the defendants were liable to make compensation to the plaintiff.

Under s. 308 the fact of damage and the amount of compensation are to be settled by arbitration, and any dispute on either of these points comes within the jurisdiction of the arbitrator. We are not without authority as to this, as the matter was before the House of Lords in *Brierley Hill Local Board* v. *Pearsall*. (1) I certainly cannot find in that case anything to indicate that the arbitrator is not to be final judge

(1) 9 App. Cas. 595.

C. A. 1899

WALSHAW v. BRIGHOUSE CORPORATION.

A. L. Smith L.J.

of the facts. This is Lord Selborne's view, stated at p. 600 of the report: "If the arbitrator goes into the inquiry, as he ought, as a question of fact, and if he deals with the facts as he finds them, but deals with them in a wrong view of those facts according to law, then no doubt his award will not be final. If an action is brought upon it, and it appears that he has been mistaken in the view of the law which has governed his view of the facts, there will be a verdict for the defendants upon the award; but if he has not miscarried, the award certainly cannot be worse for his stating upon the face of it that he finds that state of facts into which by the express terms of the law he is bound to inquire, and which alone could give any right to compensation." Lord FitzGerald in giving his opinion says, at p. 603 of the report: "In establishing his case under that section"—that is, s. 308—"the plaintiff had to sustain four propositions, viz., first, that he had sustained damage; secondly, that such damage had been occasioned by reason of the exercise by the local authority of the powers of the Act; thirdly, that such damage arose in relation to some matter as to which he was not himself in default; and fourthly, the amount of compensation to which he was properly entitled. Any dispute as to propositions 1 and 4 is to be settled by arbitration." Those are the four things which the plaintiff must prove as matters of fact before the arbitrator. How does Lord FitzGerald go on? "In the execution of his duties it is difficult to see how the arbitrator can avoid inquiring whether the acts complained of were matters done in the exercise of the powers of the Act, and as to which the claimant was not himself in default, so as to limit the scope of his assessment of compensation; but his decision, if any, as to the liability of the defendants in point of law would not be binding and would be inoperative." It is clear to me on the section itself, in conjunction with the judgments which I have quoted, that the questions of fact which the arbitrator has to determine are, like every other question of fact in a case of arbitration, within the province of the arbitrator, and his findings are conclusive if there is any evidence to support them.

Coming to this award, the arbitrator has found that the

seizure and condemnation of the carcase were made in the execution of the powers vested in the local authority; that the information was laid and dismissed, and that the carcase was not unsound when the order to destroy it was made. It is said that the arbitrator ought not to have gone into evidence as to the soundness of the meat; but it seems to me that he must do so to enable him to give a finding on the question of damage. As to the question of the arbitrator determining that the plaintiff was not in default, though he has not done so in words, he has in effect, for the plaintiff could only come within the section on the hypothesis that the carcase was not fit for human food. This is an effort to shew that there must have been default because of the conclusion at which the inspector arrived as to the soundness of the meat; but that is a matter which the arbitrator must consider in order to arrive at any conclusion.

As to the argument that the corporation are not responsible because the proceeding under which the meat was condemned was not any act of theirs but an act of a justice, this has not been adjudicated upon so as to raise any question of estoppel, and I cannot agree with it. The whole case turns upon the act of an officer of the corporation having made, as it now turns out, a blunder.

With regard to the question of damage, the person who has sustained damage is to be entitled to full compensation. The plaintiff in this case has, by reason of the proceedings that were taken against him, been put to expense, and has so much less in his pocket than he had before. Then it is said that no costs were awarded by the magistrates when they dismissed the summons against the plaintiff. As to this, the case of *Bater* v. *Birkenhead Corporation* (1) is in point, for I cannot see what difference it can make if the person interested goes before the magistrates on the question whether the meat should be condemned or whether he is brought before them on a summons. In that case Lord Esher pointed out that the words "full compensation" are very wide, and must include any pecuniary loss which a man suffers when he is not himself in default. I

(1) [1893] 2 Q. B. 77.

C. A. 1899

WALSHAW v. BRIGHOUSE CORPORATION.

think, therefore, that all the points taken for the appellants fail, and that the appeal must be dismissed.

RIGBY L.J. I am of the same opinion. I will only add one observation. It cannot be denied that the duty of the arbitrator is to determine the fact of damage and the amount of compensation to which the person who has sustained damage is entitled. It is impossible for him to do that without investigating the question whether the meat was unsound or not. That is a fact which the arbitrator must necessarily determine, and it follows that his finding is conclusive; and it is impossible for any Court, when he has found that the meat was sound, to say as a matter of law that it was not.

VAUGHAN WILLIAMS L.J. I entirely agree as to the result of the decisions in *Brierley Hill Local Board* v. *Pearsall*. (1) There can be no doubt that the arbitrator was acting within his jurisdiction in finding that the meat was sound, and his finding cannot be disputed by any one interested. I understood at one time in the argument that it was meant to be suggested that there had been a judicial order condemning the meat and determining its unsoundness. In my judgment the order for condemnation of the meat under s. 117 is nothing of the sort. I do not say that in some cases an order made under that section might not be judicial, so that it would have to be got rid of to enable the parties to raise the question of fact again; but in this case it is clear that the order was administrative, and not one that would have to be got rid of before compensation could be obtained.

As to the costs incurred in consequence of the summons, it is not disputed that the inspector and the medical officer were officers of the corporation, and that the corporation are responsible for whatever was done by them. But it is said that these costs would not have been recoverable as damages in an action for trespass, and so they cannot be taken into consideration in awarding compensation. With the general proposition as to the recovery of such costs as damages, I agree—that is to say,

(1) 9 App. Cas. 595.

that you could not have included in the damages in the action costs in respect of which there has been an adjudication by a court of competent jurisdiction, and it may be doubtful whether even under the words "full compensation" you could have included such costs in the compensation. But even if you were to put aside the case of *Bater* v. *Birkenhead Corporation* (1) as not applicable to the present case, it seems to me that there would have been a common law right in an action of trespass to have these costs considered in the assessment of damages. I entirely agree that if the matter had been before a Court which had power to adjudicate upon the costs, and has adjudicated, you cannot in any subsequent action go behind that adjudication, or go outside it in any way. But in the present case, as there was no adjudication of any sort or kind on costs, there is nothing to prevent damages or compensation being assessed on the basis of including the costs in the assessment.

Appeal dismissed.

Solicitors for plaintiff: *Walker & Rowe, for Frederick Walker, Halifax.*

Solicitors for defendants: *Williamson, Hill & Co., for Storey & Willans, Halifax.*

(1) [1893] 2 Q. B. 77.

A. M.

C. A.
1899
July 5.

[IN THE COURT OF APPEAL.]

NIX *v.* JUSTICES OF THE CITY OF NOTTINGHAM.

Licensing Acts—Licence—Beerhouse—"Real Resident Holder and Occupier"—Beer House Act, 1840 (3 & 4 *Vict. c.* 61), *s.* 1.

The mere fact that the tenant in occupation of a beerhouse carries on the sale of beer therein as the salaried employee of his landlords, a brewery company, to whom he is accountable for the profits, does not involve as a conclusion of law that he is not the real resident holder and occupier of the house within the meaning of s. 1 of the Beer House Act, 1840:—

So *held* by the Court of Appeal.

Objectors to the renewal of a licence have no right to be heard on an appeal to quarter sessions or in the High Court on a case stated by the quarter sessions:—

So *held* by the Divisional Court.

APPEAL from the order of a Divisional Court (Grantham and Lawrance JJ.) upon a case stated by the quarter sessions of the county of Nottingham in an appeal against the refusal of justices for the city of Nottingham to grant a renewal certificate authorizing the appellant to apply for and hold an excise licence to sell beer by retail.

The appellant was the holder of a licence in respect of certain premises in the city of Nottingham to sell beer by retail to be consumed off the premises, which expired on October 10, 1898. The renewal of the certificate authorizing the appellant to apply for and hold the said licence was objected to on October 5, 1898, before the licensing justices of the city of Nottingham, and refused on the ground that the appellant was not the real resident holder and occupier of the said premises within the meaning of the Beer House Act, 1840, and the Acts amending the same.

At the hearing of the appeal to quarter sessions the facts as to the holding and occupation of the appellant were proved as follows. The premises in question were a dwelling-house and shop in the city of Nottingham. The appellant had been in possession of the said premises since December 20, 1897, during

the whole of which time she had held a licence in respect of the said premises. The appellant upon taking possession of the said premises as aforesaid paid a valuation amounting to 20*l.* to a former tenant and licensee. The appellant had been a weekly tenant of the Beeston Brewery Company since she first entered the premises at a rent of 8*s.* a week, such rent being duly paid by her, and on October 5, 1898, she still continued such tenant. At the hearing before the licensing justices of her application for a renewal of the certificate the appellant refused to produce any receipt for rent alleged to have been paid by her from time to time in respect of the premises, and she stated that she had no written agreement of tenancy. The appellant had always lived and slept in the premises, occupying together with her family the whole of the dwelling-house, and had complete control over the same. The appellant had paid in respect of the premises the poor-rates as assessed. The appellant sold in the said shop the beer of the Beeston Brewery Company, Limited, who were the owners of the premises. She received a salary of 12*s.* a week from the Beeston Brewery Company for selling their beer as their manager or servant, and accounted to the company for the profits made upon the beer so sold by her on their account. She continued so to sell the beer of the said company up to December 5, 1898, after which date she carried on business for and on account of herself.

Upon the above facts the court of quarter sessions were of opinion that the appellant was not in law the real resident holder and occupier of the said premises upon October 5, 1898, upon the ground that, instead of receiving the profits of the said business, she received a salary, and had to account to the Beeston Brewery Company for all moneys received as aforesaid, and they confirmed the decision of the licensing justices on that ground, and ordered the appeal to be dismissed.

The question for the Court was whether the court of quarter sessions were right in law in holding that upon the aforesaid facts the appellant was not the real resident holder and occupier of the said premises within the meaning of the Beer House Act, 1840.

C. A. 1899

NIX v. NOTTINGHAM JUSTICES.

The Divisional Court were equally divided, Grantham J. being of opinion that the decision of the quarter sessions was wrong, and Lawrance J. being of the contrary opinion. The decision of the quarter sessions therefore remained standing.

Hugo Young, Q.C. (*W. H. Stevenson* and *T. Lindley* with him), for the appellant. The statements in the special case amount to a finding as a matter of fact that the appellant was the real resident holder and occupier of the premises; but the quarter sessions seem to have thought that the fact that in selling beer she acted as the employee of the brewery company, and was accountable to them for the profits of the business, had the effect in law of preventing her from being the real resident holder and occupier of the premises within the meaning of the Act. It is submitted that that is not so. The word "real" in the Act applies to the word "resident," the object being to secure that the licensee should really reside on the premises. The case finds that the appellant was really resident on the premises. "Holder" in the Act only means "tenant." The quarter sessions find that the appellant was really the tenant of the premises. There is nothing in the Act to the effect that the licensee must be the real owner of the business. The Act means that the licensee must be really, and not colourably only, the resident householder. On the facts found the appellant clearly is the resident householder. The statements in the case are quite inconsistent with any suggestion that the sessions intended to find that the appellant's tenancy or residence was merely colourable.

[They cited *Reg.* v. *Allmey* (1); *Reg.* v. *Manchester Justices* (2); *Brooker* v. *Wood* (3); *Reg.* v. *Kensington*. (4)]

Appleton, for the justices. Some difficulty arises from the way in which the case is stated, but it is submitted that the sessions cannot be taken to have found that the appellant was really the resident holder and occupier of the premises as a matter of fact. The licensing justices appear to have been of opinion that she was not, and the quarter sessions do not find

(1) (1871) 35 J. P. 534.
(2) [1899] 1 Q. B. 571.
(3) (1834) 5 B. & Ad. 1052.
(4) (1848) 12 Q. B. 654.

that their conclusion in that respect was wrong. Assuming however that the sessions are to be taken to have found that the tenancy and occupation of the appellant were real, and not merely colourable, but decided that as a matter of law she was not the real resident holder and occupier of the premises within the Act, it is submitted that they were right. It is clearly against the policy of the Act that a person in the position of the appellant, a mere servant of a brewery company, and dismissible at a week's notice by them, should be the licensee in respect of the premises. The intention was that the licensee should be the real holder and occupier of the house for the purposes of the business.

Hugo Young, *Q.C.*, in reply.

A. L. Smith L.J. The only difficulty I feel in this case arises from the manner in which the special case is stated, which renders it somewhat doubtful to my mind whether the justices have really stated any point of law for the opinion of the Court. The case depends on the Beer House, Act, 1840, s. 1, which enacts that "No licence to sell beer or cider by retail under the said recited Acts or this Act shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed." The person to obtain the licence must be the real resident, the real householder, and the real occupier of the dwelling-house. The word "real" is an important word in the section. Whether a person is the real resident holder and occupier of premises is a question of fact, not of law. I think that upon the facts of this case there was evidence on which the licensing justices were warranted in finding, and upon which the quarter sessions might have found, that in fact the appellant was not the real resident holder and occupier of the premises, but was a mere puppet of the brewery company. But the quarter sessions do not appear to me to have so found, and we can only deal with the case upon the facts as stated by the quarter sessions. It is not for us to draw inferences of fact from the facts actually stated. It is for the sessions to do that, and upon the facts found by them, and the inferences of fact drawn

C. A. 1899

NIX v. NOTTINGHAM JUSTICES.

A. L. Smith L.J.

by them from those facts, to state any question of law which may arise for the opinion of the Court. Now what are the facts which the quarter sessions have stated in this case with regard to the appellant's occupation of the premises? They find that, upon taking possession of the premises, the appellant paid a valuation of 20*l.* to a former tenant of them, that she had been a weekly tenant of the Beeston Brewery Company at a rent of 8*s.* a week, and that that rent had been duly paid by her. The sessions might under the circumstances have well taken the view that the payment of the rent of 8*s.* a week was a sham, seeing that the brewery company were paying the appellant a salary of 12*s.* a week as their servant, out of which the 8*s.* would come back to them; and, if the sessions had taken that view, they would have been right in finding that the appellant was not the real resident holder and occupier of the premises, but they have not done so. The case proceeds to state that at the hearing before the licensing justices the appellant refused to produce any receipt for rent, and stated that she had no written agreement of tenancy, facts which do not seem to have any bearing on the case as stated by the quarter sessions. It is further stated that the appellant had always lived and slept on the premises, occupying with her family the whole of the dwelling-house and having complete control over the same, and that she had always paid the poor-rate in respect of the premises. Having found these facts, what question do the sessions state for the opinion of the Court? I should say that, upon the before-mentioned facts being found as the real facts of the case, and no inference being drawn from them by the sessions to the effect that the arrangement as to the tenancy was a sham, and that the appellant was not the real tenant, the result must be that the appellant was the real resident holder and occupier of the premises. The case however proceeds to state that upon the above facts the court of quarter sessions were of opinion that the appellant was not in law the real resident holder and occupier of the said premises upon October 5, 1898, upon the ground that, instead of receiving the profits of the said business, she received a salary, and had to account to the Beeston Brewery Company for all moneys received as aforesaid, and they con-

firmed the decision of the licensing justices on that ground. But, assuming the facts previously stated as to the tenancy and occupation of the appellant to be real facts, the ground stated by the case is no ground for holding the appellant not to be the real resident holder and occupier of the premises. The mere fact that she did not receive the profits of the business for herself, but was employed by the brewery company at a salary and had to account to them for the profits, did not prevent her from being such a holder and occupier. On the case as stated I think the judgment of Grantham J. was right. On these grounds I think the appeal must be allowed.

A. L. Smith L.J.

VAUGHAN WILLIAMS L.J. It is provided by the Beer House Act, 1840, s. 1, that "No licence to sell beer or cider by retail under the said recited Acts or this Act shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed." I think the effect of that provision is that the licensee must be the resident holder and occupier of the house at which it is proposed to sell beer or cider, not merely in form, but in substance. In my opinion the words mean not only that the licensee must be in substance resident on the premises, but that he must also be in substance the holder and the occupier of them. There might be real residence without real occupation. The question whether the licensee is such a holder and occupier in substance is one of fact. In my judgment there was evidence in this case upon which the licensing justices were entitled to come to the conclusion to which they did come, namely, that in fact the applicant for the licence was not the real resident holder and occupier of the premises. The licensing justices having found that the applicant was not the real resident holder and occupier of the premises, there was an appeal to the quarter sessions. The sessions on the hearing did not reverse the decision of the licensing justices. They affirmed it, but not apparently as a conclusion of fact, but on the ground that the applicant's being the servant of the brewery company and accountable to them for the profits of the business, as a matter of law, prevented her from being the real resident holder and

C. A. 1899

NIX v. NOTTINGHAM JUSTICES.

Vaughan Williams L.J.

occupier of the premises within the meaning of the Act. In my opinion the quarter sessions were wrong in coming to that conclusion. The mere fact that the appellant was accountable for the profits of the business to the brewery company and received a salary from them does not necessarily negative the possibility of her being the real resident holder and occupier of the premises. That being so, I think we must answer the question put to us to the effect that the sessions were wrong in holding upon the facts found by them that as a matter of law the appellant was not the real resident holder and occupier of the premises.

Appeal allowed. (1)

Solicitors for appellant: *F. Osbaldeston & Co., for Green & Williams, Nottingham.*

Solicitors for justices: *T. B. & W. Nelson, for W. T. Cartwright, Nottingham.*

(1) It has not been thought necessary to report at length the decision of the Divisional Court in the present case, that Court having been equally divided in opinion. It was, however, also contended in that Court that the objectors, who had been allowed to take part in the proceedings at quarter sessions, had no locus standi to appear, not being parties to the proceedings, and *Boulter* v. *Kent Justices*, [1897] A. C. 556, and the judgment of Lord Davey in *Tynemouth Corporation* v. *Attorney-General*, [1899] A. C. at p. 307, were cited in support of the contention.

Hextall, for the objectors, cited *Reg.* v. *West Riding Justices*, [1898] 1 Q. B. 503; *Reg.* v. *Bowman*, [1898] 1 Q. B. 663; *Reg.* v. *Cotham*, [1898] 1 Q. B. 802.

GRANTHAM J. I am clearly of opinion that the objectors had no right to be heard at quarter sessions. The cases which have been cited to us on their behalf have no bearing upon the question. They were cases in which it was alleged that the justices had been guilty of some illegality, that they had done something which they had no right to do; and in such a case a member of the public has a right to come to this Court and endeavour to set aside the decision, and it is for the Court to say whether the action of the justices has or has not been illegal. The present case is entirely different: what the parties want decided is substantially whether there was a bonâ fide tenancy, and for the decision of that question the presence of third parties is unnecessary. I can entertain no doubt that the objectors have no locus standi either here or at quarter sessions.

LAWRANCE J. concurred.

Solicitor for the objectors: *E. Downes, for C. E. W. Lucas, Nottingham.*

W. J. B.

E. L.

THE QUEEN *v.* DAVEY AND OTHERS.

1899
May 2.

Justices—Jurisdiction—Public Health—Infectious Disease—Order for Removal to Hospital—Finality of Order—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *s.* 124.

The validity of an order for the removal to a hospital of a person suffering from a dangerous infectious disorder, made ex parte by a single justice under s. 124 of the Public Health Act, 1875, cannot be inquired into upon the hearing of a summons under that section before a court of summary jurisdiction for obstructing the execution of the order.

ORDER NISI in the nature of a mandamus calling upon certain justices of Glamorganshire and one Mary Hannah Skyrme to shew cause why the justices should not state a case for the opinion of the Court. The following were substantially the facts as appearing in the affidavits.

Mary Hannah Skyrme had been summoned to answer an information laid by the inspector of nuisances for the Margam Urban Sanitary District charging that on December 30, 1898, she obstructed the execution of an order of a justice of the peace based upon the certificate of a duly qualified medical practitioner for the removal of Ada Olive Skyrme, then suffering from a dangerous infectious disorder, to wit, scarlet fever, and being then without proper lodging or accommodation, to a suitable hospital provided within the district of the council. It appeared that on December 6 the defendant, at the suggestion of the medical officer of health, allowed her child, who was admittedly suffering from scarlet fever, to be removed to the infectious diseases hospital provided by the local authority, and that the child remained there until December 28, on which day the defendant went to the hospital and carried her home. The reasons for the removal of the child were that a day or two previously the caretaker of the hospital had admittedly been seen going home drunk, and that the child while in the hospital had been seen running across a wet room in her bare feet. After the return of the child home the doctor who had signed the certificate for her removal to the hospital said that

1899

REG. v. DAVEY.

if it were kept warm for two or three days it would be all right, and told the defendant that there was proper lodging and accommodation for the child in her house. The child was kept in a room at the end of a long passage apart from the other part of the house, and the room was properly disinfected in accordance with the instructions of the deputy medical officer of health. On December 30 the inspector of nuisances, without notice to the defendant or her husband, obtained an order ex parte from a justice of the peace for the removal of the child forthwith to the hospital; but the defendant refused to allow the child to be removed.

It was contended for the complainant that the justices had no power to go behind the order of the magistrate for the removal of the child, and that the justices had no right to inquire into the validity of the order, or to inquire whether there was a proper hospital. The justices overruled both these objections, and found as a fact that there was no suitable hospital for the reception of the child provided within the district, and that the defendant had provided proper lodging and accommodation for her child; they accordingly dismissed the case, and refused to state a case for the opinion of the Court. The present order nisi was, therefore, obtained on behalf of the inspector of nuisances. (1)

S. T. Evans, for Mrs. Skyrme, shewed cause. The decision in *Booker* v. *Taylor* (2), where a similar order was apparently held to be conclusive, was wrong, and being a decision of a court of co-ordinate jurisdiction is not binding, and should

(1) By s. 124 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), "Where any suitable hospital or place for the reception of the sick is provided within the district of a local authority, or within a convenient distance of such district, any person who is suffering from any dangerous infectious disorder, and is without proper lodging or accommodation, or lodged in a room occupied by more than one family, or is on board any ship or vessel, may, on a certificate signed by a legally qualified medical practitioner, and with the consent of the superintending body of such hospital or place, be removed, by order of any justice, to such hospital or place at the cost of the local authority. . . . . Any person who wilfully disobeys or obstructs the execution of such order shall be liable to a penalty not exceeding 10*l*."

(2) *The Times*, Nov. 21, 1882.

not be followed. It may be that in the interest of the public health a single justice should have power to make ex parte an order for removal of a patient to a suitable hospital; but it cannot have been intended that upon a subsequent summons for obstructing its execution such an order should be binding and could not be inquired into: that would be tantamount to convicting a person of a criminal offence without allowing him to be heard. There is no appeal against an ex parte order for removal, and it is therefore all the more necessary that there should be power to inquire into its propriety when subsequent proceedings are taken for disobeying or obstructing the order. The case is analogous to an order for the destruction of unsound meat, which is made ex parte; but on proceeding against the owner before a court of summary jurisdiction, evidence may be given by him as to the state of the meat at the time of its condemnation: *Waye* v. *Thompson*. (1)

Ryde, in support of the rule. There is no power to go behind the order, which, having regard to the necessity of prompt action in the interest of the public health, was intentionally made final, though obtained ex parte. There is ample security in the provisions of s. 124 of the Act against any abuse of the power of making ex parte orders of removal. The case is concluded by the decision in *Booker* v. *Taylor* (2), which has been followed for seventeen years, and has not been affected by any of the Acts amending the Public Health Act, 1875, which have been passed since that case was decided. [He also cited Stone's Justice's Manual, 28th ed. p. 924, note (*a*); *Robinson* v. *Sunderland Corporation* (3); *White* v. *Redfern* (4); *Vinter* v. *Hind*. (5)]

DARLING J. In this case it appears that a woman, who had a child suffering from scarlet fever, allowed it to be removed, not under the order of a justice, but voluntarily, to a hospital for infectious cases, where it remained some time. Upon her discovering that the hospital was not properly managed, as the

(1) (1885) 15 Q. B. D. 342.
(2) *The Times*, Nov. 21, 1882.
(3) [1899] 1 Q. B. 751.
(4) (1879) 5 Q. B. D. 15.
(5) (1882) 10 Q. B. D. 63.

1899

REG. v. DAVEY.

Darling J.

caretaker in charge was admittedly seen to be drunk, she fetched the child to her own home, and, having regard to the kind of cottage in which she lived, it is only right to say that she seems to have taken remarkably efficient steps to prevent the spread of infection. Afterwards, an officer of the local authority procured a magistrate's order under s. 124 of the Public Health Act, 1875, authorizing the removal of the child from the cottage back to the hospital. Before this order was made, I should suppose that, if any defects had existed at the hospital, they had been remedied, for I cannot imagine that any justice would knowingly order back a child to a hospital unless it was better managed. But it was difficult to convince the mother that it was safe to send the child back, and she prevented the execution of the justice's order, and for that proceedings were taken against her under s. 124 of the Act of 1875. On the hearing of the summons for obstructing the execution of the order it was objected that the justices had no power to go behind the order authorizing the removal, and the case of *Booker* v. *Taylor* (1) was cited. There the very point was raised that is raised here, namely, whether in such a case the justices were bound upon the construction of the section to convict, or whether they could go behind the removal order made by the single justice and decide for themselves whether the case was one in which such an order ought or ought not to have been made.

We have been pressed with the argument that it is somewhat arbitrary to allow a single justice of the peace to make such an order, without giving the party against whom it is made an opportunity of questioning it. I do not say that there are no means of questioning such an order, but what is urged here is that the person against whom it is made has a right to obstruct its execution, and that if there has been such obstruction then we may have the circumstances under which the order was made inquired into on a summons some days afterwards. Now, the subject-matter with which this legislation deals is the spread of infection among people who have cases of infectious disease in their own homes; and if the pro-

(1) *The Times*, Nov. 21, 1882.

ceedings to be taken by the local authority are of a dilatory character the legislation becomes nugatory. The object of the legislation is to get people so suffering into hospitals, and if the removal of the patients may be obstructed and the whole question of their removal argued de novo before the justices, the summary remedy is gone altogether, and the danger to the neighbourhood continues until the justices give their decision. Such a result was certainly never intended; it was intended to place in the hands of the local authorities a very summary remedy for the protection of the public. In my opinion the case of *Booker* v. *Taylor* (1) was rightly decided, and upon the hearing of a summons charging the obstruction of an order for removal of an infectious patient, the justices have no right to go behind the order. In saying this I am not prepared to say that the order for removal cannot be questioned in any way, and that, whether right or wrong, it is absolutely final; it is probable that a writ of habeas corpus would be open where a complaint was made that a patient had been taken to a hospital under an order improperly made. But the order clearly cannot be questioned in the manner contended for in the present case; and therefore I think that the justices were wrong in the decision to which they came. Then the question arises whether we shall make this rule absolute to the justices to state a case in order to compel them to convict. If we did, the justices might ultimately say that in their view of the facts the woman merely acted under a mistake, but with no intention of setting the law at defiance, and that on all the circumstances, though obliged to convict her of obstructing the order, they should inflict a very small fine. I do not think that it would be worth while to make the rule absolute for that end, or that anything would be gained by it; all that was really desired has been obtained.

CHANNELL J. I am of the same opinion. I think we must hold that *Booker* v. *Taylor* (1) was rightly decided. The general principle of law is that an order affecting his liberty or property cannot be made against any one without giving him

(1) *The Times*, Nov. 21, 1882.

1899

REG. v. DAVEY.

Channell J.

an opportunity of being heard; the result is that, if general words are used in a statute empowering the making of such an order as this, it must be made on notice to the party affected. There are, however, exceptions to this rule, which arise where it can be seen on the words of the statute that it was intended that the order should be made on an ex parte application, and the case in which it is easiest to see the propriety of the exception is where, looking at the scope and object of the legislation, it was clearly intended that the parties putting the law in force should act promptly. Such a case is an order for the destruction of unsound meat, which clearly may be made ex parte, because it is desirable in the interest of the public health that it should be acted upon at once. The case of removing an infectious person, likely to spread abroad the infection, to an infectious hospital is obviously of the same character, and it is necessary that action should be taken upon such an order promptly. Looking at the whole section, I think it was intended that a justice might make an ex parte order for removal upon the certificate of a medical practitioner, and, of course, upon being satisfied as to the other matters mentioned in the statute. The statute intends the order to be made ex parte; it is necessary to act upon it at once. If the order is disobeyed, the reasons for urgency are not affected; they remain just the same. The offence contemplated by the section has been committed if a person, knowing that an order has in fact been made, wilfully disobeys it; if he does so, he is liable to be convicted under the section, and the justices cannot go behind the order and say that it is not a proper order to be made. It is unfortunate that the statute provides no better means of carrying out its provisions, for it is the experience of judges and magistrates alike that ex parte orders are sometimes obtained upon evidence which turns out to be wrong or in other respects unsatisfactory. In the present case there was a very strong ground for making an ex parte application for an order to send the child back to the hospital from which it had been taken by its mother, on the ground that the caretaker was intoxicated, for I strongly suspect that the justice was not told a word about that incident; and the case to some extent

1899

REG. v. DAVEY.

Channell J.

illustrates the danger of ex parte orders; the balance of convenience, however, is in favour of such orders being made. There must be a mode of questioning them: probably certiorari would be the proper remedy, and possibly, as my brother Darling suggests, habeas corpus would lie, but neither remedy is very convenient.

Under the circumstances, therefore, I think that the justices were wrong in saying that they had power to go behind the order and to consider whether it was rightly made; but looking at the view they took of the case, that the mother was acting in the interests of her child, I should have said that, though she ought not to have acted as she did, it was only a case for the infliction of a nominal penalty. If that is what the end of the case ought to be, are we bound to make this rule absolute in order that the justices may state a case? I think not. Under 20 & 21 Vict. c. 43, s. 5, I think there is a further discretion vested in this Court beyond the discretion vested in justices, and that we are entitled to consider whether the circumstances are such that we ought to direct a case to be stated. It seems to me that where the person accused has been acquitted, but ought to have been convicted in a nominal penalty, it is not worth while to insist on a case being stated. If the party has been convicted by the justices on a wrong view of the law, the case is of course different, for there is no other way than the stating of a case by which the conviction can be got rid of without great difficulty. On the facts, I should be prepared to find that the woman acted as she did in the interests of her child; and I think that the rule should be discharged, but, under the circumstances, without costs.

Rule discharged.

Solicitors for prosecutor: *Bell, Brodrick & Gray, for T. J. Hughes, Bridgend.*

Solicitors for respondent Skyrme: *Sharpe, Parker, Pritchard & Barham, for Cuthbertson & Powell, Neath.*

W. J. B.

1899
May 2.

WILLIAMS *v.* MACDONALD.

Licensing Acts—Offences—Falsely pretending to be a Traveller—Person Arriving at or Departing from Railway Station—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 25—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 10—*Sunday Closing* (*Wales*) *Act*, 1881 (44 & 45 *Vict. c.* 61), *s.* 4.

A person who, after taking a ticket at a railway station, obtains intoxicating liquor at the refreshment-room at the station during prohibited hours and then leaves by train, even though he took the ticket in order to obtain the intoxicating liquor before starting, cannot be convicted under s. 25 of the Licensing Act, 1872, of obtaining intoxicating liquor during closing hours by falsely representing himself to be a traveller, but is within the exemption in s. 10 of the Licensing Act, 1874, in favour of persons arriving at or departing from a railway station by railroad.

CASE stated by justices for the county of Glamorgan.

The appellant had appeared to answer an information laid against him by the respondent charging him with having on November 6, 1898, by falsely representing himself to be a traveller, unlawfully obtained from the Rhondda and Swansea Bay Railway Company, at the refreshment-rooms at Cymmer Railway Station, certain intoxicating liquor, to wit, beer, in contravention of the provisions of s. 25 of the Licensing Act, 1872.

The facts proved and found by the justices were as follows: The Rhondda and Swansea Bay Railway Company were duly licensed to sell intoxicating liquors in and upon their refreshment-rooms at the station at Cymmer. On Sunday, November 6, 1898, the appellant was in the refreshment-rooms at that station at 9.40 A.M., and represented that he intended to depart from that station by railroad to Blaengwynfi, another station on the same railway and distant about two miles from Cymmer Station, and asked for and obtained from the servant of the company in charge of the rooms a glass of beer. The appellant then had, and produced to the respondent, an inspector of police, at his request a ticket from Cymmer to Blaengwynfi, and he did in fact depart from Cymmer by the train leaving for Blaengwynfi at 9.48 A.M. The place where the appellant

lodged during the night previous to November 6, 1898, was within three miles of the refreshment-rooms. The appellant was not a bonâ fide traveller at the time he entered the refreshment-rooms and obtained the glass of beer, and he obtained his ticket for the purpose of obtaining intoxicating liquor at the refreshment-room before starting.

It was contended on behalf of the appellant that as he was a person intending to depart by train he was entitled to ask for and to be supplied with the glass of beer, and that the provisions as to bonâ fide travellers in s. 10 of the Licensing Act, 1874, did not apply to the case; and also, upon the facts, that the appellant had not committed any offence against the provisions of that section, and could not be prosecuted or convicted under that section or under s. 25 of the Licensing Act, 1872.

The justices were of opinion that, inasmuch as the appellant had lodged within three miles of the refreshment-room during the previous night, he was not a bonâ fide traveller, and that he obtained his ticket and departed by the train for the purpose of obtaining intoxicating liquor before starting, and that he had no right to ask for and be supplied with the beer, and therefore convicted him.

The question for the opinion of the Court was whether the determination and conviction were right in law. (1)

S. T. Evans, for the appellant. The conviction was wrong. The justices have confused two classes of persons recognised by the Licensing Acts, bonâ fide travellers and railway

(1) By 35 & 36 Vict. c. 94 (The Licensing Act, 1872), s. 25, "Every person who by falsely representing himself to be a traveller or a lodger buys or obtains or attempts to buy or obtain at any premises any intoxicating liquor during the period during which such premises are closed in pursuance of this Act shall be liable to a penalty not exceeding five pounds."

By 37 & 38 Vict. c. 49 (The Licensing Act, 1874), s. 10, "Nothing in this Act contained as to hours of closing shall preclude the sale at any time, at a railway station, of intoxicating liquors to persons arriving at or departing from such station by railroad."

By 44 & 45 Vict. c. 61 (The Sunday Closing (Wales) Act, 1881), s. 4, "Nothing in this Act contained shall preclude the sale at any time at a railway station of intoxicating liquors to persons arriving at or departing from such station by railway."

1899

WILLIAMS v. MACDONALD.

travellers and they have imported the three-mile limit and other provisions as to bonâ fide travellers into s. 10 of the Act of 1874, which applies to all persons arriving at or departing from a station by railroad. There is nothing in the statute to justify such a limitation of the provisions of that section, which is an exemption in favour of persons arriving or departing by train, and which is introduced in almost identical language into the Sunday Closing (Wales) Act, 1881. The only question is whether the appellant was a person arriving at or departing from a railway station, and there is nothing to justify the conclusion that he falsely represented himself to be a bonâ fide traveller; he merely said that he was going by train, and he went; he was therefore within the exemption. [He cited *Fisher* v. *Howard* (1); *Peache* v. *Colman*. (2)]

J. E. Bankes, for the respondent. The conviction was right. The exemption in favour of persons arriving at or departing from a railway station is an exemption in favour of railway travellers only, and the appellant was not a railway traveller. *Penn* v. *Alexander* (3) shews that merely travelling three miles does not make a man a bonâ fide traveller if the object of his journey was to obtain intoxicating liquor, and by parity of reasoning the mere purchase of a ticket did not make the appellant a traveller if the object of the purchase was to get drink. If the inspector had not come in to the refreshment-room, the appellant might not have gone by train at all, and then he would not have been within the exemption. It is a sine quâ non that in order to get the benefit of the exemption a person must actually go by train, but that does not make him necessarily a traveller, and the appellant was not a traveller in any sense in which that word is used in the Licensing Acts.

S. T. Evans, in reply.

DARLING J. I am of opinion that this appeal should be allowed. It appears that the appellant went to a railway station in Wales and obtained, during the time that the public-houses were closed, a ticket entitling him to travel to a station

(1) (1864) 34 L. J. (M.C.) 42. (2) (1866) L. R. 1 C. P. 324.
(3) [1893] 1 Q. B. 522.

two miles away. The justices have found that he obtained the ticket and that he departed by the train, and also that he did so for the purpose of obtaining intoxicating liquors before starting by train. It is contended that he was wrongly convicted, because it is provided in s. 10 of the Licensing Act, 1874, that nothing in that Act as to hours of closing is to preclude the sale at any time at a railway station of intoxicating liquor to persons arriving at or departing from such station by railroad. The respondent was charged under s. 25 of the Licensing Act, 1872, with falsely representing himself to be a traveller. If he had falsely represented himself to be a traveller, and had by that means obtained drink at the refreshment-room of the railway station at a time when the public-houses were closed, there is nothing in s. 10 of the Licensing Act, 1874, which could avail to save him; but as he in fact departed by train, and the words of the section are "arriving at or departing from such station by railroad," there is evidently a serious question for our consideration. If a man is entitled to obtain intoxicating liquors at departing, it must mean "before departing," and is equivalent to "if about to depart." If he did depart, he travelled by rail; but it is contended that he was not a genuine traveller so as to be exempted from the provisions of s. 25 of the Licensing Act, 1872. Then is he a traveller at all? Is he a person about to depart by train? It is said that he is not, because he did not mean to go by the train when he bought the drink, or else because he got the ticket for the purpose of obtaining intoxicating liquors. There is nothing in the Act which says that he must be a traveller with some purpose, such as a commercial traveller, or a traveller for pleasure. He did not cease to be a traveller because he took a ticket for the purpose of getting a drink before starting and probably getting another before he came back. He was not falsely representing himself to be a traveller when he really was a traveller. The suggestion on the part of the prosecution that he had taken the ticket not meaning to travel at all, and that he would not have gone by the train but for the inspector coming in to the bar, is easily disposed of; if these had been the facts, he would not have been a traveller nor a person

1899

WILLIAMS v. MACDONALD.

Darling J.

departing by train, for it would be useless for him to say that he had bought a ticket, if he did not go by the train; he would not be within the language of the exemption. Whatever was the motive with which he took his ticket, he did depart by the train and was not a person falsely representing himself to be what he really was—a traveller.

CHANNELL J. I also think that this appeal should be allowed and the conviction quashed. In my opinion the second paragraph of s. 10 of the Licensing Act, 1874, means that persons arriving at or departing from a railway station by railroad are bonâ fide travellers within the meaning of the Act. If that is the meaning, the section reads consistently. If in fact a person is not departing or about to depart by train, he is not a bonâ fide traveller, or a traveller at all. If the justices had found that when he was supplied with liquor the appellant never intended to go by the train, and that he only went because the police inspector came in, I think that their decision would have been right; but I cannot see that they have so found; indeed, they have found other facts which are inconsistent with it. I think that the appellant was a person departing by train, and that he was entitled to be supplied with intoxicating liquor, and was a bonâ fide traveller for the purposes of the Act. The latter part of the section is easy to construe; if the proprietor is prosecuted for serving and proves that the customer represented himself to be departing by train when in fact he was not, I think that the licensed person would be within the protection of the section, and the proper course would be to prosecute the customer under s. 25 of the Licensing Act, 1872, for falsely pretending that he was departing from the station. I read s. 25, which deals with a representation by a customer that he is a traveller, as meaning that he falsely represents himself to be such a traveller as is entitled to be supplied with intoxicating liquor—that is, a bonâ fide traveller or a person departing from a railway station. It is true that it leaves it open to a person to go by train two miles or so when his real motive is to get drink; but that is a consideration which ought not to affect our judgment; it is a case of evading

the Act or not being brought within it. On the findings of the justices I think the conviction ought to be quashed.

Appeal allowed.

Solicitors for appellant: *Sharpe, Parker, Pritchard & Barham, for Cuthbertson & Powell, Neath.*

Solicitors for respondent: *Norris, Allens & Chapman, for Tennant & Jones, Aberavon.*

W. J. B.

LUSCOMBE *v.* GREAT WESTERN RAILWAY COMPANY.

1899
May 16.

Railway Company—Liability to Fence—Owner and Occupier of adjoining Land—Adjoining Highway—Licensee of Owner of Soil—Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20), *s.* 68.

A railway company, whose premises adjoin a public highway, is not bound to fence against cattle straying upon the highway, and not merely passing and repassing along it, although they are upon the highway by permission of the owner of the soil.

Cattle belonging to a farmer were allowed to graze in a wood adjoining his farm; through the wood ran a highway, the property in the soil of which was in the owner of the wood. The cattle got upon the highway, and left it at a point where it was adjacent to the land of a railway company, and, getting on to the line along an unfenced approach road belonging to the railway company, were killed by a passing train:—

Held, that the railway company were not liable.

APPEAL from a decision of the county court judge of Plymouth.

The action was brought to recover damages for an alleged breach of the statutory duty imposed upon the defendants by s. 68 of the Railways Clauses Consolidation Act, 1845, to fence lands taken by them for the purposes of the railway from the adjoining lands. The facts were shortly as follows.

The plaintiff was tenant to Lady Blachford of a farm, called Langham Farm, which included part of a down, called Henlake Down. Adjacent to Henlake Down was a wood belonging to Lady Blachford and not in the plaintiff's occupation; between that part of Henlake Down which was occupied by

1899

LUSCOMBE v. GREAT WESTERN RAILWAY.

the plaintiff and the wood was a gate which was maintained by Lady Blachford, and was frequently left open by the workers going to and from a neighbouring quarry. Through the wood ran a metalled path, which was a public highway, the property in the soil of which was in Lady Blachford; this road ran in the direction of, and passed under, the defendants' line of railway; the wood adjoined for some distance the land of the defendants. Shortly before reaching the railway a private approach road belonging to the defendants left the highway and ran to the Ivybridge Station on the defendants' line; this approach road was unfenced. On the day in question eighteen of the plaintiff's cattle passed from that part of Henlake Down which was in the plaintiff's occupation into the adjoining wood, probably through the gateway already mentioned; they were in the wood with the tacit acquiescence of Lady Blachford's steward, who said that he did not look upon them as trespassers when in the wood, because of the difficulty in keeping the gate shut. The cattle then got upon the highway, and eventually passed along the approach road on to one of the platforms and thence on to the line, where three of them were killed by a passing train. The plaintiff claimed as damages the value of the cattle killed. The learned judge non-suited the plaintiff on the ground that the cattle were trespassing on the highway, and the plaintiff appealed.

Duke, Q.C. (*J. K. F. Cleave* with him), for the plaintiff. The county court judge was wrong in holding that the cattle were trespassing at the time they got upon the defendants' premises. Admitting that the obligation of a railway company under s. 68 (1) of the Railways Clauses Consolidation Act is only co-extensive with the prescriptive obligation at common law to repair fences, there is nothing in the circumstances of the

(1) By 8 & 9 Vict. c. 20 (The Railways Clauses Consolidation Act, 1845), s. 68, "The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, that is to say, ... sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout, by reason of the railway . . . ."

present case to relieve the defendants from liability towards the plaintiff. The cattle were lawfully in the wood, being there with the consent of the owner; they were also lawfully upon the highway, being there by the licence of the plaintiff's lessor, in whom the property in the soil of the highway was vested. The duty of a railway company to fence against cattle extends to animals on adjoining land by permission of the occupier: *Dawson* v. *Midland Ry. Co.* (1); and the highway is adjoining land within the meaning of the section: *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Wallis.* (2) There was no evidence to justify a finding that the cattle were trespassing on the highway. [He also cited *Ricketts* v. *East and West India Docks Ry. Co.* (3); *Harrison* v. *Duke of Rutland.* (4)]

Schiller, for the defendants. The defendants were under no obligation to fence against these cattle, which were merely straying on the highway. Cattle on a highway are trespassers, unless they are merely passing and repassing along the highway, which means that they must be using the road as a highway, as by being driven along it: *Dovaston* v. *Payne* (5); they must be attended to by some person, whether actually travelling along the highway or grazing by the side of it. The landlord of a tenant, whose cattle are pasturing in his wood, cannot give a licence to his tenant to let his cattle stray unattended upon the highway: such a right in the landlord would be inconsistent with the dedication of the highway to the public, unless expressly reserved at the time of dedication. *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Wallis* (2) is a clear authority in favour of the defendants; *Dawson* v. *Midland Ry. Co.* (1) is distinguishable, for in that case there was no highway at all, and the plaintiff had the leave and licence of the occupier to use the close adjoining the railway for his horses.

Duke, Q.C., in reply.

DARLING J. I am of opinion that the judgment of the county court judge was right and should be affirmed. It is necessary to see how these cattle got upon the highway. They

(1) (1872) L. R. 8 Ex. 8.
(2) (1854) 14 C. B. 213.
(3) (1852) 12 C. B. 160.
(4) [1893] 1 Q. B. 142.
(5) (1795) 2 H. Bl. 527.

1899

LUSCOMBE v. GREAT WESTERN RAILWAY.

Darling J.

strayed from the land where they were into the wood without express licence, though their presence was not objected to. Then they got upon this road, again not by any express permission; they strayed there. They were on the highway, but were not using it for the purpose of passing along it; they were not using it as a highway. The ownership of the soil of the highway was in Lady Blachford. In order to avoid any difficulty with the decisions as to leave and licence from the owner of the soil of the highway to go upon the highway, let us treat this case as if the cattle were Lady Blachford's own cattle; neither Lady Blachford, nor any one else, would have a right to use the highway in a manner inconsistent with its being a highway. This is clear from the decision in *St. Mary, Newington* v. *Jacobs* (1), which lays down that, as the interest of the public in a highway is limited to the right of passage along it, the owner of the soil may use it for his own purposes in any manner not inconsistent with this right. Therefore in the present case the owner of the soil, Lady Blachford, could not lawfully use the highway in a manner inconsistent with the right of the public to use it as a highway. The evidence is that these cattle were straying upon the highway; they were not in the care of anybody; they were not using the highway to pass from one point to any other point; they were simply straying about it; and that being so I cannot see that it matters whether they were the cattle of the owner or of the occupier; they were not upon adjoining land lawfully. Assuming the highway to be adjoining land, if they were passing along it using it as a highway they would be lawfully using it, occupying it as adjoining land; but they do not appear to me to have been doing anything of the kind.

On the part of the plaintiff it is said that in order to absolve the defendants the cattle must have been trespassers, in which case there would be no obligation on the railway company to fence them out; but it is contended that they were only strays and not trespassers. I do not think there is much in that contention. I think that the decision in *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Wallis* (2) depends upon the fact that

(1) (1871) L. R. 7 Q. B. 47. (2) 14 C. B. 213.

the horses were straying, not that they were trespassers in the sense in which the plaintiff's counsel would have us to understand trespass. In *Harrison* v. *Duke of Rutland* (1) Lord Esher says: "Highways are, no doubt, dedicated primâ facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser." But, on the other hand, it is clear from the language of Lord Esher in the same judgment that, if he does use it in a manner which is not reasonable and which is not the usual mode of using it, then by parity of reasoning he will be a trespasser. Then is it a reasonable and proper way to use a highway for cattle to be allowed to stray about it? I should say that nothing more inconsistent with the usual and reasonable use of a highway could well be imagined. In most cases it would be possible either to take and impound the cattle or to prosecute those to whom they belonged, and it appears to me that to whomsoever those cattle belonged they were strays, and were trespassers in the sense that they were upon the highway using it in a way in which they had not the right to use it. I think that the defendants were not bound to fence against them, and that, as these facts appeared in the plaintiff's own case, the nonsuit was right.

CHANNELL J. I am of the same opinion. The liability, if any, of the defendants arises under s. 68 of the Railways Clauses Consolidation Act, 1845, which imposes a liability upon railway companies to fence as against the owners and occupiers of the adjoining land. When the adjoining land is ordinary land, not a highway, no difficulty arises; but when the adjoining land happens to be a highway there may be considerable difficulty in applying that section. In *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Wallis* (2) the Court seems to have come to the conclusion—I do not know that they decided it, because their judgment was in favour of the railway company—that the cattle of persons who were lawfully using the highway for the

(1) [1893] 1 Q. B. 142. (2) 14 C. B. 213.

1899

LUSCOMBE v. GREAT WESTERN RAILWAY.

Channell J.

purpose of passing or repassing might be considered to be the cattle of the owners and occupiers of the adjoining land within the meaning of the section. That seems rather to strain the natural meaning of the words "owners and occupiers" of the adjoining land, and the Court so held, as I gather from its judgment, because, unless that interpretation were put upon the words, there was no provision in the Acts for the case of a highway adjoining the railway; they were bound, therefore, to put a sensible construction upon the section when the adjoining land was in fact a highway, and the meaning they put upon it was that in that case cattle, which were lawfully using the highway for the purpose of passing and repassing, were to be considered as cattle of the owners and occupiers of the adjoining land within the meaning of the section. If that is the meaning to be put upon the section, it excludes the view that the cattle which happen to belong to, or to be licensed by, the owner of the soil over which the highway runs, could be considered to be cattle of the owners and occupiers within the meaning of that section. I do not however think it is necessary for us to decide in this case whether, if these cattle had been Lady Blachford's cattle, she might not have possibly had a remedy against the defendants; that question may be reserved for future consideration. It is sufficient for me to say that I do not think it is possible to say that the cattle of the owner of this tenement, who had only a licence to depasture his cattle in the wood through which the road went (and incidentally therefore his landlady could probably not have objected so far as she was concerned to the cattle being on the highway), can be considered to be cattle of either the owner or the occupier of the adjoining land within the meaning of this section. If that is so, the decision of the county court judge was right.

Appeal dismissed.
Leave to appeal refused.

Solicitors for plaintiff: *Ravenscroft, Woodward & Hills, for Woolcombe & Son, Plymouth.*

Solicitor for defendants: *R. R. Nelson.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1899
April 29;
May 6.

HOLNESS *v.* MACKAY & DAVIS.

Employer and Workman — Compensation — Accident arising out of and in Course of Employment — Workman going to Work — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

A firm of contractors, under a contract with a railway company for the widening of their line, were ballasting a siding which was separated from the main line by several lines of rail. The siding could only be reached by walking for a considerable distance through the premises of the railway company, and the workmen were advised by the contractors, with the authority of the railway company, to enter the premises by a gate, from which a path led by the side of the railway to the siding which was being ballasted; it was not necessary, while following this route, to go upon the main line. On a foggy morning, seven minutes before the hour for the commencement of the day's work, a workman in the employ of the contractors, while on his way to his work at the siding, was run over and killed on the main line about 150 yards from the locality of his work:—

Held, by A. L. Smith L.J. and Vaughan Williams L.J. (Romer L.J. dissenting), that it was no part of the contract of employment that the employment should include the time taken in getting to and from the work, that under the circumstances the contractors owed no duty to the workman while proceeding to his work, and that therefore the accident did not arise out of and in the course of the employment of the workman within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897.

Per A. L. Smith L.J. A workman who is injured in a place not under his employer's control while going to or returning from his work is not within the provisions of the Workmen's Compensation Act, 1897.

APPEAL from a decision of the judge of the Newport County Court upon an application for compensation under the Workmen's Compensation Act, 1897. The facts as found in the written judgment of the county court judge were substantially as follows:—

The applicant was the widow of a workman named Holness. The appellants were the contractors with the Great Western Railway Company for widening their line of railway between Newport and Cardiff, and Holness was at the time of the accident a ganger in their employment: his weekly wages

C. A. 1899

HOLNESS v. MACKAY & DAVIS.

averaged 1*l.* 12*s.* 2*d.* The gang of which Holness was in charge was at work ballasting a siding at a place on the south side of the main line between Newport and Cardiff, at a distance of about 800 yards from the Cardiff end of the tunnel, which is just outside Newport Station. Holness lived in Newport, and was going to his work in the early morning, when he was killed at a place about 150 yards nearer to Newport than the place where the work of his gang lay. The work was to commence at 7 A.M.; he was walking on the main down-line when, at 6.53 A.M., he was knocked down and killed by a train coming up behind him. The weather was thick and foggy, and it was barely daylight. There were only two places where Holness, going from Newport to his work, could get upon the line and pass along it to his work: one was the Waterloo gate, which was close to the Cardiff end of the tunnel and on the south side of the line; the other was the Maesglas gate, which was about 400 yards nearer to Cardiff and was on the north side of the line; if he used the Maesglas gate he would have had to cross the main lines to get to his work, but not if he used the Waterloo gate, from which a footpath ran by the side of the railway to the siding where his work lay. There were several lines of sidings between the siding that was being ballasted and the main line. There was no evidence as to the gate by which he got upon the line that morning, or as to the gate which he generally used, but there was evidence that he had been told by the appellants' foreman to use the Waterloo gate (which was the nearer and more convenient gate for him), and to follow by the side of the line from that point. The learned county court judge assumed that he got on the line by the Waterloo gate. The judge also held that it was part of the deceased's contract of service that he should go to his work along the line of railway, and that he began his day's work as soon as he got upon the railway line for the purpose of going to his work, by whichever gate he got upon the line. He accordingly held that the accident arose out of and in the course of the employment of the deceased, and awarded compensation to the widow and children.

The employers appealed.

Ruegg, Q.C., and *David*, for the appellants. The accident did not arise out of the employment of the deceased, although it would be true to say that but for the employment it would not have happened; the accident must arise out of the work he had contracted to do. His work did not begin when he commenced to use the licence by passing through the gates on to the railway premises; the appellants had no control over that part of the railway premises, and owed no duty to their workmen to see that the premises were safe; the work, that is the employment, did not begin until the workmen arrived at the siding, where the work was to be done and over which the appellants had control. Nor did the accident arise in the course of the employment: to satisfy that condition it must happen during the time for which the workman is employed. And, further, it did not happen on, in, or about the locality of the work which the master had contracted to do, for it happened 150 yards away. The cases of *Brydon* v. *Stewart* (1) and *Tunney* v. *Midland Ry. Co.* (2), which were relied upon by the county court judge, are distinguishable upon their facts from the present case.

Montague Lush, for the respondent. There was evidence to justify the finding of the county court judge that the injury arose out of and in the course of the employment of the deceased. It is not necessary, in order to satisfy the limitation in s. 1, that the workman must have actually commenced his day's work. It is not contended that the master is universally liable for the safety of a workman when going to his work; it must depend on the circumstances of each case, and there was evidence here that warranted the finding that the appellants were liable. The case is within the principle laid down by Lord Cranworth in *Brydon* v. *Stewart* (3), that "whatever the man does in the course of his master's employ, according to the fair interpretation of these words eundo, morando, redeundo, the master is responsible." The deceased was obliged to pass along part of the railway line in the course of his service to his master, who was entitled to authorize him to go there under

(1) (1855) 2 Macq. 30. (2) (1866) L. R. 1 C. P. 291.
(3) 2 Macq. at p. 36.

C. A. 1899

HOLNESS v. MACKAY & DAVIS.

the contract which he had made with the railway company; he had no business to be on the railway premises at all except in the course of his duty to the appellants. If before getting to the locality of his employment a workman is obliged to encounter the very dangers to which the statute expressly applies, it is not a strained construction to say that the injury arose out of and in the course of the employment, for the workman is at any rate not doing anything out of the scope of his employment. There was ample evidence to justify a finding in fact that the deceased strayed on to the main line owing to the fog.

A. L. SMITH L.J. This case raises a question of considerable importance—whether an employer is liable under the Workmen's Compensation Act for injuries received by a workman while going to or returning from his work. I do not think that the counsel for the respondent has been able successfully to maintain the affirmative of this proposition—that is, that in such a case the workman's injuries arise out of or in the course of his employment upon one of the localities enumerated in s. 7, sub-s. 1, of the Act. The facts are not very long. The appellants were a firm of contractors who were engaged in ballasting a siding at the side of a line of railway, and the deceased was a workman engaged by them; over this siding the contractors had control, but they had none over the line where the man was killed. On the morning of the accident the deceased (whose duty was in the ballasting of the siding over which his employers had control) had two ways of getting to the place where he had to work. He might have entered the railway premises by the Waterloo gate, and if he had, it seems that he need not have got upon the Great Western line from first to last; if he came in at the other gate, he must have crossed the main line. He was found killed lying across the main line, and had apparently walked some distance down that line when he was overtaken by an express train.

The question is whether this accident arose out of and in course of the deceased's employment. The employment of the deceased was in ballasting the siding, and although it is true that the contractors had leave to enter the railway premises

by the Waterloo or by the Maesglas gate, yet it was no part of the contract of employment that the deceased should use one gate or the other when getting on to the premises though he had permission to do so. Whilst going to his work and before his work commenced, in fact seven minutes before the hour for its commencement and some distance from his work, the deceased met with his death; it is apparent from the plan and from the evidence that the hour for work had not arrived, and that the man had not arrived at the locality of his work. It seems, therefore, that the question comes to this—whether the appellants are liable under this Act for an accident to one of their workmen which happened while he was going to his work.

It has been urged on behalf of the respondent that the case is like that of a man who is employed in a large quarry and who is killed in the quarry while going to his work in a particular portion of it, or that of a man who, while going to his work on the upper floor of a large factory, is killed in a lower floor of the factory while on his way to his work. But those are very different cases; there the employer has the control over the whole quarry or factory, and I am not prepared to say that an accident happening in a downstairs room to a man on his way to his work in an upstairs room would not be within the Act, but I do not decide it; I leave this open. With all respect to the learned counsel's argument, those cases are very different: in the case of a quarry or a factory the employer has the control over the whole of the premises; here the appellants had no control over the railway premises except that part where the work under their contract was being actually performed, for the mere licence to use the premises to get to the locality of the work gave the contractors no right of control over the portion along which they passed or over the trains running thereon. The present case seems to me like the case of a man who meets with an accident while passing along a highway or any other way in order to get to his work. I do not think that it was part of the contract of employment that the employment should extend till the deceased got to the place where his work was, or rather should include the time

C. A. 1899

HOLNESS v. MACKAY & DAVIS.

A. L. Smith L.J.

taken in getting to that place, nor can I hold that he had in contemplation of law begun his work when he had not got to the place where his work lay and the time for commencing work had not arrived. It is true that the accident happened only seven minutes before his work was to commence; but if the shortness of the time is an element for our consideration, where is the line to be drawn? There can be only one line which can be safely drawn, one test which can be safely applied, and that is that unless the injury arises out of and in the course of the workman's employment and happens on the locality where he is employed he does not come within the terms of this Act. On these grounds I think that the decision of the county court judge was wrong. I cannot hold that an accident has arisen out of and in the course of the employment when it has happened either before the employment commenced or after it had terminated.

Two cases at common law were cited during the argument, both of which were relied on by the learned county court judge. In *Brydon* v. *Stewart* (1) a pitman had been taken down the shaft of a mine to his work; while there he determined to come up on business of his own, and he was taken up the shaft in the ordinary way; the shaft, however, was in an insecure condition, and while he was ascending a stone fell out of the side of the shaft and killed him. It was there held by the House of Lords that the master, who had taken the workman down the mine, was bound to exercise due care in bringing him up, although he was coming up on his own business, and that the mine-owner was, therefore, liable. That is a very different case to the present one. The case of *Tunney* v. *Midland Ry. Co.* (2) is likewise easily distinguishable upon the facts, for it was a term of the workman's employment that he should be taken to and back from his work in the pick-up train to which the accident happened. For the reasons I have given, I think that this appeal should be allowed.

VAUGHAN WILLIAMS L.J. I agree. I should like first to make a general observation as to the judgment of the learned

(1) 2 Macq. 30.

(2) L. R. 1 C. P. 291.

county court judge. It seems to me an excellent judgment, and, though I do not agree with the legal conclusion to which he came, I fully recognise that he grappled with the true question of law which he had to decide, and no one could be more surprised than he would be to hear it suggested, as was done by counsel for the respondent, that his judgment was intended to be merely a judgment on the facts, and not a decision on a point of law. Further, if it is looked at as a judgment on the facts, the county court judge, in so far as he does find the crucial and material facts, gives reasons for his finding, and in such a case it is always open to a Court of Appeal to deal with the facts for the finding of which he has given his reasons. This is obviously right, for if the conclusion of fact has been arrived at by means of a faulty syllogism, it would be monstrous that the Court should be unable to correct such a mistake. The question here, however, is a pure question of law, which we ought to decide apart from rhetorical appeals and views as to what ought to be the law; it is whether, according to the true construction of this statute, this accident arose out of and in the course of the deceased's employment.

Now s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897, says that if in any employment to which the Act applies personal injury "by accident arising out of and in the course of the employment" is caused to a workman, his employer is to be liable to pay compensation. One question, therefore, that we have to determine is whether on the facts of this case, as found by the county court judge, it is a case of an accident arising out of and in the course of the employment of the deceased. Admittedly the accident did not occur after the hour at which, according to the contract, the employment was to begin; the employment was to begin not only in time, but in consecution of events, after he had arrived at 7 o'clock at the locality of his work. Therefore, according to my understanding of his judgment, the county court judge comes to the conclusion as a general proposition that the employment did not begin until the workman got to the place where he had to do his work. But the county court judge considered that, although this was the general rule, the duration of the employment (including

C. A. 1899

HOLNESS v. MACKAY & DAVIS.

Vaughan Williams L.J.

both its commencement and its ending) might be amplified by reason of the nature of the employment and of the scope of what was to be done under the contract of employment. I think that he had ample authority for so holding. In his judgment he cites *Brydon* v. *Stewart* (1), which shews that, though the employment is at an end in the sense that the workman (whether rightly or wrongly) has ceased to work under the contract, yet the employment may continue because of an obligation of the employer to the workman arising out of the course of the employment and continuing at the time of the occurrence of the accident. The county court judge asked himself very justly whether in the facts of this case there was to be found anything happening, or any state of things existing at the moment of the accident, which arose under the contract and involved the existence of a duty on the part of the employer towards the workman; he found that there was such a state of things, and therefore found that the accident arose in the course of the employment of the deceased. On this point I have come to a different conclusion. In *Brydon* v. *Stewart* (1) the workman had to go to and from his work up and down a shaft which was under the control of his employer; it is obvious that in that case there was an obligation, whether it was express or implied, to provide means of access to and from the work, and to maintain the shaft in a reasonable state of safety. But on the facts of the present case the employer owed no such obligation to the workman. He was under an obligation to get from the railway company such a licence for his workmen to go on the company's premises as should enable them to reach the spot where they had to work without being liable to be treated as trespassers; but that was the whole of his obligation. I do not say that if the employer had got a licence or means of access for his men which involved their going by a peculiarly dangerous or difficult route, a question might not have arisen for our consideration; but all that the employer did in the present case was to get leave of access, enabling his men to get to their work without trespassing, and to recommend the use of the Waterloo gate and footpath as

(1) 2 Macq. 30.

the safest mode of access. I do not mean to say that the deceased was a trespasser when he went to his work by the other route (if he did do so); but I should hesitate much before coming to the conclusion of the county court judge that he actually went by the recommended route or that the recommended route was an ordered route. If he went by the recommended route, he would not go within a considerable distance of the spot where he was killed, and could not get there without passing over five or seven lines of railway. It seems to me that, as far as the employers are concerned, they had, under the circumstances of this case, performed their duty when they obtained a licence for their men to go on the line to get to their work, and that it was no part of their duty to look after the running of the trains, or to warn the men against crossing the line, or in any way to take care of them when doing so. In my opinion there was at the time of the accident no existing state of things to shew that the employer owed a duty to the workmen either by reason of an express or implied contract, and there was nothing to extend the duration of the employment beyond the times at which under the contract it was to begin and end.

The learned counsel for the respondent compared this case to that of a man injured in a factory while going to his work on the top floor of the factory. If he meant by that illustration a case like the present, where the whole factory is not under the control of the employer, it is simply an illustration of "idem per idem," and does not assist us at all; but if he meant a case where the whole factory was under the employer's control, the analogy is useless and does not help us at all, unless the learned counsel can explain to us why the case of a factory not wholly under the employer's control should be dealt with as analogous to the case of a factory wholly under the control of the employer.

ROMER L.J. I regret to say that I have come to a different conclusion from that of the majority of the Court, and I need hardly say that I have done so with diffidence. The county court judge has found that the accident arose out of and in the

C. A. 1899

HOLNESS v. MACKAY & DAVIS.

Romer L.J.

course of the employment of the deceased. Was there evidence upon which this finding can be properly supported? I think that there was, and that we ought not to differ from his conclusion; indeed, I should myself have come to the same conclusion on the evidence. The facts are for the most part undisputed. The deceased man was in the employment of the appellants, who had contracted with the railway company to do certain work at a spot substantially surrounded by lines of railway, and the access to which was not unattended with danger. By their contract with the railway company the appellants had to provide access for their workmen at their own cost, and accordingly they directed the men that they must cross the line to get to their work. The men were bound by the necessities of their employment and as part of its duties and dangers to cross the lines and to have, through the appellants, a special right or licence from the railway company to cross them; that special right or licence being given by implication. When the workmen began to cross the lines, they were acting under this right or licence obtained for them by the appellants; they were doing something which they were specially bound to do under their contract of employment, and which they could not lawfully do but for that contract. Under these circumstances I think that the employment in this case substantially began when the deceased began to act upon the implied right or licence to cross the lines. I am of opinion, therefore, that the county court judge was justified in holding that the accident occurred in the course of the deceased's employment. I think also that his finding was correct as to the circumstances under which the accident occurred. The deceased had been told to go to the Waterloo gate; it was his nearer and more convenient way to get to his work, and it was in evidence that he was never known to use the other gate. On the facts, I should come to the conclusion that he did go by the Waterloo gate, and that he lost his way owing to the fog, and that the accident arose directly by reason of his being obliged to cross the dangerous zone of lines in order to get to his work. I think, therefore, that the deceased man was at the time of the accident acting in the course of his

employment, and that the accident arose out of his employment. The cases shew that the Court is not bound by a hard and fast line to consider that a workman is not acting in the course of his employment until he actually begins the work which he has to do. To my mind the present case is like that of a workman whose work lies in a particular part of a large factory, and who in order to get to it has to go through the rest of the factory and meets with an accident while so going. It is said that there is a distinction because all the parts of a factory are under the control of the same employer; but I consider that case analogous to the present; for the railway company had given the contractor the right to bring his men to their work across the lines, and the contractor had in a sense a right of control over the lines by virtue of which alone the men used the lines. In principle, therefore, I think that this case cannot be distinguished from that of the factory. This case is not like that of an injury received on the public highway by a man while going to work, when of course the employer, having nothing directly to do with the highway or its user by the men, would not be liable. Looking at the facts, I think that the very able judgment of the county court judge was correct, and that this appeal ought to be dismissed.

Appeal allowed.

Solicitors for the appellants: *W. Hurd & Son, for David & Evans, Cardiff.*

Solicitor for respondent: *F. P. Jones-Lloyd, Barry Dock.*

W. J. B.

C. A.
1899
May 13.

[IN THE COURT OF APPEAL.]

IRONS *v.* DAVIS & TIMMINS, LIMITED.

Employer and Workman—Compensation—Accident causing Personal Injury—Partial Incapacity—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clause* 1 (*b*), *clause* 2.

The sole test of the right of a workman to a weekly payment under Sched. I., clause (*b*), of the Workmen's Compensation Act, 1897, in respect of partial incapacity for work, is his wage-earning capacity after the accident which caused the injury in respect of which compensation is sought. Where therefore a workman, although put to a different class of work after the accident, receives from his employers the same wages that he previously received from them, he is not entitled to a weekly payment in respect of partial incapacity after his return to work, his right to compensation being limited to a weekly payment in respect of total incapacity (after the second week) during his absence from work occasioned by the accident.

Appeal from the decision of the judge of the Clerkenwell County Court upon an application under the Workmen's Compensation Act, 1897.

The respondent, a lad of seventeen years of age, applied under the Act for compensation for personal injury sustained by him while in the employment of the appellants as a brass-finisher. While screwing a nut on a revolving spindle he received an injury which resulted in the amputation of the top joint of his thumb. He had been receiving 9*s.* a week wages before the accident; he was absent from his employment for eight weeks after the accident, at the end of which time he was taken back by the appellants at the same rate of wages, but was not put to the same class of work as before the accident. The county court judge awarded him a sum of 27*s.*, being 50 per cent. of his average weekly earnings for six weeks; as to this there was no appeal. He also awarded him a further sum of 2*s.* 6*d.* per week for life. From the latter part of the award the employers appealed.

A. T. Lawrence, *Q.C.* (*Rowlatt* with him), for the appellants. In awarding the weekly payment for life the county court

judge proceeded upon a wrong principle; there was no evidence upon which he could properly make such an award, the effect of which is that the respondent is in a better pecuniary position than before the accident. Under Sched. I., clause 1 (*b*), the respondent has been awarded 50 per cent. of his average weekly earnings during his absence from work; this is all to which he is entitled. The risk insured against is the wage-earning capacity of the workman, and that is not affected when he earns the same wages after as before the accident.

[ROMER L.J. Ought not the fact that at twenty-five the respondent might not be able to earn a man's wages to be taken into account?]

The Act makes no provision as to that, and impliedly negatives such a suggestion. There was no loss of wages, and there was therefore no incapacity for work within the meaning of Sched. I., clause 1 (*b*), in respect of which a weekly payment could be awarded; neither would it be possible, in fixing a weekly payment under such circumstances, to have regard to the conditions contained in clause 2 of the schedule. (1)

Ruegg, Q.C. (*Edward Browne* with him), for the respondent. There was evidence to justify the award of a weekly payment to the respondent. Though he was paid the same wages after as before the accident, he was not, and could not have been, put to do the same class of work, and the incapacity for work in respect of which compensation is payable under clause 1 (*b*) of Sched. I. must be an incapacity for that class of work which the workman was doing at the time of the accident. And, further, the direction in clause 2 must mean that regard is to be had to the difference between the average weekly earnings

(1) By Sched. I., clause 1, of the Workmen's Compensation Act, 1897, "The amount of compensation under this Act shall be . . . . (*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings . . . . such weekly payment not to exceed one pound."

By clause 2, "In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity."

C. A. 1899

IRONS v. DAVIS & TIMMINS, LIMITED.

before the accident and the average amount which the workman is able afterwards to earn at the same class of work. The effect of the accident is that for the rest of his life the respondent will not be such a good wage-earning machine, although he may for the time be receiving the same wages. If there is no power to award the respondent a weekly payment, he cannot at any future time make an application under clause 12 of Sched. I. for review of the payment, however much his wage-earning capacity may prove to have been affected by the accident. (1)

A. L. SMITH L.J. In this case the county court judge has awarded the respondent 27*s.* in respect of six weeks' disablement and consequent absence from work, and as to that part of his award there is no contest. He has also awarded him a sum of 2*s.* 6*d.* a week for life, in respect of partial incapacity for work; but I think there is no evidence to justify the award of that or any other sum as a weekly payment under clause 1 (*b*) of the first schedule. The evidence shews that, although the respondent lost the top of his thumb, he actually earned the same wages after as before the accident, and as compensation under the Act is given in respect of loss of wages and not in respect of personal suffering, I cannot see, having regard to the provisions of clause 2 of the first schedule, how the respondent can be entitled to a weekly payment after his absence through incapacity to work has come to an end; there is no difference between his average weekly earnings before the accident and the average amount which he is able to earn afterwards that can possibly be taken into consideration. But under clause 12 a weekly payment once awarded may be

(1) *A. T. Lawrence, Q.C.*, in reply to a suggestion of the Court, consented to the amount of the weekly payment awarded being reduced to a nominal sum in order to preserve to the respondent, if necessary, the right of applying for a review under Sched. I., clause 12, which provides that "Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

C. A.
1899
IRONS
v.
DAVIS & TIMMINS, LIMITED.
A. L. Smith L.J.

reviewed at the request of either party; and as the counsel for the appellants has assented to our suggestion that the amount awarded should be reduced to a nominal sum, so as to preserve to the respondent his right to avail himself of that provision, we will reduce the amount of the weekly payment to 1*d*. It is therefore understood that if in the future the ability of the respondent to earn wages is affected by this accident, the county court judge will have power, under clause 12, to review the award and to increase the amount of the weekly payment.

VAUGHAN WILLIAMS and ROMER L.JJ. concurred.

Appeal allowed without costs.

Solicitors for appellants: *Trower, Freeling & Parkin.*
Solicitors for respondent: *Pattinson & Brewer.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1899
May 13.

EDWARDS *v.* GODFREY.

Employer and Workman—Compensation—Accident causing Personal Injury—Unsuccessful Action against Employer—Right to Assessment of Compensation under Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-ss.* 2 (*b*), 4.

Where a workman, who has been injured by an accident arising out of and in the course of his employment, brings an unsuccessful action to recover damages against his employer, and is desirous of having compensation for his injury assessed under the Workmen's Compensation Act, 1897, he must follow the procedure prescribed by s. 1, sub-s. 4, of that Act, and must apply then and there to the judge trying the action for an assessment of compensation; he cannot at a subsequent date initiate independent proceedings against his employer by a request for arbitration under that Act.

APPEAL from an award of the judge of the Wandsworth County Court made on an application under the Workmen's Compensation Act, 1897.

The appellant, a builder, was erecting a studio at the top of

C. A. 1899

EDWARDS v. GODFREY.

a house more than thirty feet high, and scaffolding was used in the work; the respondent, who was employed by him to glaze the studio, was injured by a fall while descending outside the house from the roof to the ground. The respondent brought an action against the appellant under the Employers' Liability Act, 1880, founded on an alleged defect in the condition of the ways, works, and plant. At the trial of the action in the Wandsworth County Court on January 9, 1899, the jury found that the respondent had been guilty of contributory negligence, and judgment was entered for the defendant, the present appellant. No application was made at the time on behalf of the respondent for an assessment of compensation under s. 1, sub-s. 4 (1), of the Workmen's Compensation Act, 1897; but on January 30 the respondent filed with the registrar of the county court a request for arbitration under the Act, which came on for hearing on March 13, when the judge made an award in favour of the respondent for 11*s.* a week.

The employer appealed.

Frank Gover, for the appellant. The county court judge had no jurisdiction to entertain this application. It is clear from the language of s. 1, sub-s. 2 (*b*), of the Act (2) that the

(1) By 60 & 61 Vict. c. 37 (The Workmen's Compensation Act, 1897), s. 1, sub-s. 4, "If, within the time hereafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. In any proceeding under this sub-section, when the Court assesses the compensation, it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act."

(2) By s. 1, sub-s. 1, of the Act, certain employers are made liable to pay compensation to their workmen for injuries arising out of and in the course of the employment.

By s. 1, sub-s. 2, "Provided that .... (*b*.) When the injury was caused by the personal negligence or wilful

workman has the option given him of taking proceedings under the Act for the assessment of compensation, or of bringing an action against his employer independently of the Act; he cannot do both. The object of the sub-section is to prevent double proceedings against the employer, and the proviso in the latter part must be read as a limitation attaching a condition to the exercise of the new right given to the workman. Where the workman exercises his option by bringing an action independently of the Act, and fails in the action, he can only obtain the benefit of the Act by availing himself of the provisions of s. 1, sub-s. 4. That sub-section is in favour of the workman, and the assessment of compensation which it authorizes can only be made at the instance of the plaintiff in the action, who must make his application for assessment of compensation at the time when his action is dismissed; the liability to pay compensation under the Act must be determined "in the action." If this were not the case, but the workman were at liberty at a future time to institute proceedings under the Act, it would be impossible for the county court judge to give any directions as to the deduction from the compensation of costs caused by bringing the action instead of proceeding under the Act in the first instance, for then clause 14 of Sched. I. would apply, which forbids any claim to be set off against a weekly payment awarded under the Act.

Colam, for the respondent. The proceedings under the Workmen's Compensation Act, 1897, were properly brought, and the county court judge acted within his jurisdiction in awarding compensation. The provisions of s. 1, sub-s. 2 (*b*), only apply where the injury is caused by the personal negligence or wilful act of the employer or of some person for whom

act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act . . . . except in case of such personal negligence or wilful act as aforesaid."

C. A. 1899

EDWARDS v. GODFREY.

he is responsible; that is not the case here. The object of the sub-section was in cases of negligence to preserve to the workman his existing civil remedies, with the qualification that the employer is not to be liable to pay compensation both under and independently of the Act; there is nothing in the sub-section, either express or implied, to prevent the workman from having a double remedy in respect of the same injury, and from taking proceedings under the Act after failure of his proceedings independently of the Act, provided only that he does not get double compensation. Sub-s. 4 does not cut down the rights of the workman either at common law or under the Employers' Liability Act; it was intended to obviate as far as possible the costs of independent proceedings, and also to give jurisdiction to the county court judge, who, when sitting as a judge to try an action under the Employers' Liability Act, could not act as an arbitrator under the Workmen's Compensation Act. The only effect of not applying under sub-s. 4 is that the county court judge could not proceed then and there to assess the compensation under the Act.

A. L. SMITH L.J. I am of opinion that this appeal should be allowed. The respondent brought an action against the appellant under the Employers' Liability Act, and in so doing exercised the option which he undoubtedly possessed in favour of what I may call his common law remedy. At the trial he was defeated, and there, under ordinary circumstances, would have been an end of the action, for if in respect of any matters arising out of the same accident he had again sued the appellant he would have been met by the defence of res judicata. On January 9 the common law action was heard; the jury came to the conclusion that the respondent had been guilty of contributory negligence and was not entitled to succeed; thereupon judgment was given for the defendant, the present appellant, and the common law action came to an end. On January 30 the respondent launched proceedings under the Workmen's Compensation Act against the appellant in respect of the same injuries, and an award was eventually made by the county court judge in favour of the respondent. The point taken

on behalf of the appellant is that, upon the true construction of the Workmen's Compensation Act, 1897, the respondent could not, after having exercised his option by bringing a common law action, revert to the provisions of that Act and bring proceedings under it for the assessment of compensation. Our decision must depend upon the true construction of sub-ss. 1, 2 (*b*), and 4 of s. 1, and some light is thrown upon them by clause 14 of Sched. I. As I read s. 1, sub-s. 2 (*b*), it gives to the workman, in cases where he would previously have had a right of action, an option, which he may exercise as he likes, of bringing an action at common law, or of resorting to the procedure for the assessment of compensation given by the Act itself; this seems to me to be the clear meaning of the sub-section. The respondent has availed himself of the right given him by that sub-section; he has exercised his option in favour of bringing a common law action, which has failed. Having been defeated in this action, there would, but for the provisions of s. 1, sub-s. 4, have been an end of any claim by the respondent against the appellant in respect of the injury. That sub-section, however, is in favour of the workman, and gives him a very great advantage where he has exercised his option and finds too late that he has exercised it in the wrong way; it gives him a locus pœnitentiæ, and enables the county court judge before whom the action is tried, if applied to by the plaintiff at the time, to assess compensation under the Act. That is a clear benefit to the workman, and while giving it to him the sub-section also confers a benefit upon the employer by giving the county court judge power to deduct from the compensation which he awards all the costs caused by bringing the action instead of taking proceedings under the Act; that is a fair enactment, giving something to master and man alike. I believe the construction which I have placed upon sub-s. 4 to be the true one; were it not so, the workman would never make his application for an assessment of compensation while the county court judge had seisin of the action; he would wait until the action was at an end, and would then bring a fresh claim under the Workmen's Compensation Act, and would so get compensation without having the costs caused

C. A. 1899

EDWARDS v. GODFREY.

by his bringing the action set off against the amount of his compensation.

VAUGHAN WILLIAMS and ROMER L.JJ. agreed.

Appeal allowed.

Solicitor for appellant: *E. J. H. Carter.*
Solicitor for respondent: *G. Aplin Nichols.*

W. J. B.

C. A. 1899 *June* 27; *July* 6.

[IN THE COURT OF APPEAL.]

WILLIAMS *v.* BIRMINGHAM BATTERY AND METAL COMPANY.

Negligence—Master and Servant—Employer and Workman—Defect in Plant or Machinery—Knowledge of Workman—Risk voluntarily incurred—"Volenti non fit Injuria."

While a workman was in the course of his employment descending from an elevated tramway belonging to his employers, his foot slipped, and he fell to the ground, receiving injuries which caused his death. The employers had provided no ladder or other safe means of ascending to and descending from the tramway. In an action brought by the widow of the deceased against his employers under the Fatal Accidents Act, 1846, to recover damages in respect of his death, the jury found (1.) that the defendants had not exercised due care to have the tramway in a safe and proper condition so as to protect their servants working upon it against unnecessary risks; (2.) that it was dangerous to descend from the tramway without a ladder; (3.) that the deceased had the same means of knowing that it was dangerous as the defendants had; and (4.) that the deceased did know that it was dangerous:—

Held, that, in the absence of any finding by the jury that the deceased had agreed to undertake the risk of descending from the tramway without a ladder or other safe means of descent, the plaintiff was entitled to judgment upon the findings of the jury.

Smith v. *Baker*, [1891] A. C. 325, discussed and followed.

APPEAL from the judgment of Darling J. as after mentioned. The action was brought under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), commonly called Lord Campbell's Act, by a widow to recover damages for the death of her husband

through injuries sustained by him while in the defendants' employment.

At the trial of the action before the learned judge and a jury the facts appeared to be as follows. There was on the defendants' premises a tramway, elevated about eleven feet from the ground, which ran along the outer wall of their refining shop, and thence to a canal. There was a crane at the canal end of the tramway by which iron ore brought in boats by the canal was hauled up. The ore was then loaded into trucks and taken along the tramway to the refining shop. There were bins at intervals alongside the tramway into which the ore was discharged. No ladder or other safe means was provided by the defendants for the purpose of enabling their workmen to ascend to or descend from the tramway. The workmen usually clambered up and down at a spot near the canal end of the tramway by means of an iron spike hammered into the wall of the refining shop and an iron bar attached to the tramway. The deceased, who was sixty years of age, was afraid to do this, and on the occasion when he met his death, having to descend from the tramway in the course of his work, he endeavoured to do so by getting upon the top of the wall of one of the before-mentioned bins and thence on to a heap of ore in the bin, but, his foot slipping on the wall, he fell backwards into an empty bin and was killed by the fall. It appeared that the defendants were aware of the absence of any ladder or proper means of ascending to or descending from the tramway.

The learned judge left the following questions to the jury, who returned the following answers. (1.) Did the defendants exercise due care to have the tramway in a safe and proper condition so as to protect their servants working upon it against unnecessary risks? Answer: No. (2.) Was it dangerous to descend from the tramway without the means of a ladder? Answer: Yes. (3.) Had the deceased the same means of knowing that this was dangerous as the defendants had? Answer: Yes. (4.) Did the deceased know it was dangerous? Answer: Yes. (5.) Was he guilty of contributory negligence? Answer: No. The jury assessed the damages at 130*l*. Upon

C. A. 1899

these findings the learned judge entered judgment for the defendants.

WILLIAMS v. BIRMINGHAM BATTERY AND METAL COMPANY.

Cecil H. Walsh, for the plaintiff. On the findings of the jury the plaintiff was entitled to judgment. The tramway without proper ladders or other means of ascent to or descent from it was obviously dangerous to the workmen, and there was clearly negligence on the part of the defendants in not providing such means for enabling the workmen to ascend and descend safely: see *Smith* v. *Baker* (1); and the jury have so found. It is also clear that the death of the deceased was due to that negligence. That being so, the defendants are primâ facie liable. The question is whether that liability is affected by the knowledge of the risk by the workman. It is now clear upon the cases that mere knowledge of the danger on the part of the workman does not absolve the employer in such a case from liability. It is a question for the jury whether, having regard to the circumstances of the particular case, the workman must be taken to have agreed to undertake the risk: *Yarmouth* v. *France* (2); *Smith* v. *Baker*. (1) The jury have not found, and were never asked to find, that the deceased man agreed to undertake the risk. The defence appears to have been based on the case of *Griffiths* v. *London and St. Katharine Docks*. (3) But that case is distinguishable. It was a case not of neglect by the employers to provide some appliance necessary for the safety of the workman, but of an appliance which was provided having become out of repair—to which different considerations apply: and that case was decided before the law on the subject had been settled by *Smith* v. *Baker*. (1) The case of *Mellors* v. *Shaw* (4) is an authority in the plaintiff's favour. [He also cited *Watling* v. *Oastler*. (5)]

Hugo Young, *Q.C.*, and *Shakespeare*, for the defendants. First, there was no breach of any duty owed by the defendants to the deceased in this case. Secondly, it is clear on the facts that the deceased agreed to take the risk of descending from

(1) [1891] A. C. 325.
(2) (1887) 19 Q. B. D. 647.
(3) (1884) 13 Q. B. D. 259.
(4) (1861) 1 B. & S. 437.
(5) (1871) L. R. 6 Ex. 73.

the tramway without a ladder or other proper appliance. The cases of *Yarmouth* v. *France* (1) and *Smith* v. *Baker* (2) were cases arising under the Employers' Liability Act, 1880, which for the purposes of that Act alters the liability of a master towards his workman from that to which he would have been subject at common law. At common law it is clear that a master owes no duty to a workman in respect of a defect in machinery which is patent to the workman: see per Lord Esher M.R. in *Yarmouth* v. *France* (3); *Membery* v. *Great Western Ry. Co.* (4) Apart from any statutory obligation, a master may, if he chooses, have machinery that is insufficient or defective; and if the workman, with knowledge that it is so, agrees to work at it, or continues to do so after knowledge, the master incurs no liability to the workman in respect of the condition of the machinery: *Skipp* v. *Eastern Counties Ry. Co.* (5); *Dynen* v. *Leach* (6); *Paterson* v. *Wallace* (7); *Clarke* v. *Holmes* (8); *Woodley* v. *Metropolitan District Ry. Co.* (9); *Seymour* v. *Maddox* (10); *Thomas* v. *Quartermaine.* (11) The cases in which the employer has been held responsible to the workman for defects in plant or machinery are cases in which the defect is or might with due diligence have been known to the employer and is unknown to the workman: *Griffiths* v. *London and St. Katharine Docks.* (12)

Assuming that it is necessary, in order to absolve the master from liability, that there should be an express or tacit agreement by the workman to take the risk, it is submitted that, although there is no finding of the jury in this case to the effect that the deceased agreed to take the risk, the facts point irresistibly to the conclusion that he did; and, the evidence on that point being all one way, the Court should enter judgment for the defendants. There may be cases in which a workman has continued in his employment with knowledge to some extent of the risk, but in which it is a more or less doubtful question

(1) 19 Q. B. D. 647.
(2) [1891] A. C. 325.
(3) 19 Q. B. D. 647, at pp. 651, 653.
(4) (1889) 14 App. Cas. 179.
(5) (1853) 9 Ex. 223.
(6) (1857) 26 L. J. (Ex.) 221.
(7) (1854) 1 Macq. 748.
(8) (1862) 7 H. & N. 937.
(9) (1877) 2 Ex. D. 384.
(10) (1851) 16 Q. B. 326.
(11) (1887) 18 Q. B. D. 685, at p. 688.
(12) 13 Q. B. D. 259.

C. A. 1899

WILLIAMS v. BIRMINGHAM BATTERY AND METAL COMPANY.

whether the proper inference from that fact is that he agreed to take the risk. Take for instance the case of *Smith* v. *Baker* (1), where the risk did not arise directly in connection with any action by the plaintiff himself, but from an operation in another department of the works over which he had no control. In the present case it cannot be said that the deceased, who incurred the risk by his own direct action in descending from the tramway without a ladder, did not agree to undertake the risk.

Cecil H. Walsh, in reply.

Cur. adv. vult.

July 6. A. L. SMITH L.J. read the following judgment:— This is an action at common law for damages brought by the widow of a deceased workman, by the aid of Lord Campbell's Act, against the masters of the deceased man for having been guilty of negligence whereby the workman lost his life, and the first two questions left to the jury by the learned judge were: Did the defendants exercise due care to have the tramway in a safe and proper condition so as to protect their servants working upon it against unnecessary risks? And the answer was, No. Secondly, Was it dangerous to descend from the tramway without the means of a ladder? Answer, Yes. I will deal with the other questions left to the jury hereafter. This case was remarkably well argued before us by the learned juniors on each side, and I believe almost every case bearing upon the liability of a master for injuries to his servant in the course of his employment and the applicability thereto of the maxim, "Volenti non fit injuria," was brought out in review before us; but when the case is rightly apprehended the judgment may be comparatively short. In the first place, there can be no doubt as to the duty of a master to his man, and I will take a passage upon this subject from Lord Herschell's judgment in *Smith* v. *Baker* (2) in the House of Lords. The noble Lord says: "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances,

(1) [1891] A. C. 325. (2) [1891] A. C. 325, at p. 362.

and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk." This being the master's duty towards his man, if the master knowingly does not perform it, it follows that he is guilty of negligence towards the man; and the first two findings of the jury in this case shew that the defendants had not performed this duty, and had therefore been guilty of negligence towards the deceased, and it is not disputed that it was by reason of the absence of the ladder caused by this neglect of duty that the deceased man met with his death. In my opinion there was ample evidence to support the above findings, for it was proved that the absence of the ladder which was the cause of the accident had been well known to the defendants, and that they neglected to provide it, and hence the occasion of the man's death. This is not the case where a master has provided proper appliances and done his best to maintain them in a state of efficiency, in which case the man has no action against his master if the appliances became unsafe whereby the man has been injured unless he avers and proves that the master knew of their having become unsafe, and that the man was ignorant of it: *Griffiths* v. *London and St. Katharine Docks.* (1) When proper appliances have been supplied by a master to a man they may well become unsafe to the knowledge of the man and without the knowledge of the master, and so it is that each issue must in such a case be established by the man when he sues his master. This is the case of no proper appliances having been supplied by the master at all, so that the man might carry on his operation in such a way as not to be exposed to unnecessary risk. The case is similar to that of *Mellors* v. *Shaw.* (2) If this case had stopped here it appears to me clear that there must have been judgment for the plaintiff, she having proved personal negligence in the defendants whereby the deceased man met with his death; and how do the defendants seek to get rid of this case so far successfully made and proved against them? They plead in their defence that "the alleged defect and want," i.e., of a ladder, was known to the deceased, and also that he was

(1) 13 Q. B. D. 259. (2) 1 B. & S. 437.

C. A. 1899

WILLIAMS v. BIRMINGHAM BATTERY AND METAL COMPANY.

A. L. Smith L.J.

guilty of contributory negligence. As regards this last defence, the jury have negatived it. But what as to the defence set up that "the defect and want (of the ladder) was known to the deceased"? What defence is that to the proved personal negligence of the masters? The defendants have advisedly abstained from raising the defence of the deceased man having contracted or consented or undertaken to run the risk of the defect, i.e., the want of the ladder, so as to raise the defence summarised by the maxim, "Volenti non fit injuria." That the mere knowledge of the risk does not necessarily involve consent to undertake the risk has now beyond question been settled by the House of Lords. See the judgments in *Smith* v. *Baker* (1), and specially the judgment of Lord Halsbury (2), citing with approval Bowen L.J. and Lindley L.J. The sole question which was asked of the jury as to this was, Had the deceased the same means of knowing that this was dangerous as the defendants had? Answer, Yes. Did the deceased know it was dangerous? Answer, Yes. How does this prove that he either contracted, or consented, or undertook to accept the risk? The defendants called no evidence. They did not even attempt to shew what was the contract under which the deceased man served. Nor did they ask that any question as to whether the man had contracted to take the risk should be left to the jury. As Lord Watson said in *Smith* v. *Baker* (3): "When, as is commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it, unless he knew of its existence, and appreciated or had the means of appreciating its danger. But, assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk and the workman's connection with it, as well as upon other considerations, which must vary according to the circumstances of each case." If

(1) [1891] A. C. 325. (2) [1891] A. C. at p. 337.
(3) [1891] A. C. 325, at p. 355.

the defence of "Volenti non fit injuria" which the defendants not only in their pleadings, but also at the trial did not raise, was to be insisted upon, they must have obtained a finding of the jury upon it in their favour. They have not done so, and for the reasons above I think that the judgment entered by the learned judge for the defendants must be set aside, and judgment entered for the plaintiff for the 130*l.* damages assessed by the jury in favour of the plaintiff, with costs here and below. My brother Vaughan Williams agrees with this judgment.

ROMER L.J. read the following judgment:—Many authorities bearing on the question we have to decide have been cited and discussed. I do not propose to review them. They appear to me to establish the following propositions as to the liability at common law of an employer of labour. If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. If by reason of breach of that duty a servant suffers injury, the employer is primâ facie liable; and it is no sufficient answer to the primâ facie liability for the employer to shew merely that the servant was aware of the risk and of the non-existence of the precautions which should have been taken by the employer, and which, if taken, would or might have prevented the injury. In order to escape liability the employer must establish that the servant has taken upon himself the risk without the precautions. Whether the servant has taken that upon himself is a question of fact to be decided on the circumstances of each case. In considering such a question the circumstance that the servant has entered into, or continued in his employment, with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive, against him.

I will now apply the above propositions to the case before us. The tramway as left by the defendants without ladders, or other safe means for ascending to and descending from it, was clearly dangerous. The defendants in not providing these ladders, or other safe means, were in my opinion guilty of breach of duty to the workmen employed about the tramway.

C. A. 1899

WILLIAMS v. BIRMINGHAM BATTERY AND METAL COMPANY.

Romer L.J.

This is in substance what the jury have found by their answers to the two first questions left to them by the judge. That the workman Williams was injured by reason of the absence of the precautions above mentioned which should have been taken by the defendants is clear. For that injury, then, the defendants are primâ facie liable. The question then is, Have the defendants established a case to free themselves from the primâ facie liability? The only findings of the jury favourable to the defendants are that Williams had the same means of knowing the danger as the defendants, and did know the danger. These two findings are not sufficient to free the defendants from liability, unless they amount to a finding that Williams took upon himself the risk of working on the tramway in the absence of the ladders or other safe means of ascending and descending. It appears to me that such a conclusion cannot be drawn from these two findings of the jury. This being so, on the findings of the jury as a whole there should be judgment for the plaintiff. No doubt there was evidence before the jury on which the defendants, if they had taken the point, might have asked the jury to hold that Williams had taken upon himself the risk. But no such finding was asked for by the defendants, and indeed I cannot see that the point as to Williams having taken upon himself the risk was at all taken by the defendants prior to this appeal. I presume they thought it hopeless to expect to succeed on the point. At any rate they cannot now ask us to decide as a matter of fact that Williams had taken upon himself the risk, or call upon us to act as if a finding to that effect had been obtained from the jury. It appears to me, therefore, that the appeal should be allowed and judgment entered for the plaintiff for the ascertained amount of damage with costs here and below.

Appeal allowed.

Solicitors for plaintiff: *Thomas White & Sons, for W. H. Egginton, Birmingham.*

Solicitors for defendants: *Timbrell & Deighton, for Shakespeare & Co., Birmingham.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1899
June 2, 9.

In re RHOADES.
Ex parte RHOADES.

Bankruptcy—Insolvent Testator—Administration Order—Official Receiver, Vesting in—Vesting Order, Effect of—Executor—Debt—Retainer—Assertion of Right—Payment of Assets to Official Receiver without retaining Debt—Mistake—Repayment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 125, *sub-ss.* 1, 2, 5, 9.

An executor who is a creditor of his testator is not bound, in order to preserve his right of retainer out of the assets he has got in, to assert his right before occasion arises, as on an attempt to take assets out of his possession: if he asserts it then, his right will be protected, unless he has done some act, by release or otherwise, to deprive himself of it.

When an order has been made under s. 125, sub-ss. 1, 2, of the Bankruptcy Act, 1883, for the administration of the estate of an insolvent testator, thus vesting the estate in the official receiver under sub-s. 5, the effect of the order is to vest in the official receiver so much only of the estate as is properly distributable among the creditors, and not to deprive third parties of any rights which they have acquired to withdraw from distribution assets in their possession and which they have a right to retain.

Thus, such an order does not deprive an executor-creditor of his legal and equitable right of retainer out of the assets which he has got in, even though by mistake and in ignorance of his rights he has paid over the assets to the official receiver under the administration order; nor is he deprived of that right by proving for his debt in the bankruptcy, if on discovering his error he withdraws his proof. In that case he is entitled to be repaid the sum he would have been entitled to retain had the assets been still in his possession.

Decision of Wright J., [1899] 1 Q. B. 905, affirmed.

THIS was an appeal by the official receiver and trustee in bankruptcy from the decision of Wright J. (1)

Levett, Q.C., and *Whinney*, for the appellant. It was too late for the executrix to exercise her right of retainer after the administration order vesting her testator's estate in the official receiver under s. 125 of the Bankruptcy Act, 1883. (2) The

(1) [1899] 1 Q. B. 905.

(2) Sect. 125 of the Bankruptcy Act, 1883, contains the following sub-sections:—

"(1.) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he

C. A. 1899

RHOADES, *In re.* RHOADES, *Ex parte.*

effect of the vesting order is just the same as if she had died without having exercised her right of retainer. She could only exercise her right while in possession of the assets, and when she had the right to distribute them among creditors: when she gave up her right to distribute she had no longer the power to pay herself, unless she had done something to shew her intention to assert her right to retain. No doubt, if an executor dies after shewing an intention to exercise his right, but without having actually exercised it, the right is kept alive, and his legal personal representative may enforce it. The cases on retainer are collected in Williams on Executors, 9th ed. vol. i. pp. 885–6. But it is essential, in order to preserve the right, that it should have been claimed by the executor in his lifetime; and that is the foundation of the decision of Pearson J. in *Wilson* v. *Coxwell.* (1) Here, after the executrix had parted with the control of her testator's estate, it was too late to exercise her right, for the estate was no longer hers.

[ROMER L.J. referred to the judgment of Cotton L.J. in *In re Compton.* (2)]

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been alive, may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy.

"(2.) Upon the prescribed notice being given to the legal personal representative of the deceased debtor, the Court may, in the prescribed manner, upon proof of the petitioner's debt, unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may upon cause shewn dismiss such petition with or without costs. . . .

"(5.) Upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the official receiver of the Court, as trustee thereof, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act. . . .

"(9.) Notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition under this section shall, in the event of an order for administration being made thereon, be deemed to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made by the legal personal representative shall operate as a discharge to him as between himself and the official receiver; save as aforesaid nothing in this section shall invalidate any payment made or any act or thing done in good faith by the legal personal representative before the date of the order for administration."

(1) (1883) 23 Ch. D. 764, 766.

(2) (1885) 30 Ch. D. 15, 19.

It is clear that something must be done by the executor himself in order to exercise his right of retainer, if he is to preserve his right of retainer after parting with the assets: *Burge* v. *Brutton* (1); *In re Williams.* (2) *In re Gilbert* (3) does not go to this point: it merely decides that the right of retainer is not tied down to money but may be asserted against assets in specie. But the essence of retainer is the ownership by the executor at the time the retainer is exercised.

Reed, Q.C., and *Rolt*, for the executrix, Mrs. Rhoades. There is no case shewing that before an administration order under s. 125 there must be an active exercise by the executor of his right of retainer. *Burge* v. *Brutton* (1) is the only case to be found--if it is one, which may be doubted—shewing that something must be done by the executor to shew his intention of exercising his right; but the decision is supportable on other grounds. There the executor did not, as the executrix did in the present case, receive the assets. Where the executor actually receives and holds money by which he can pay himself, as the executrix here did by realizing the assets and paying the amount into her own bankers in her own name, this is enough to entitle him to exercise his right of retainer. In fact, it is said that if the executor's debt amounts to or exceeds the assets, the property is altered, and it belongs absolutely to him in satisfaction of his debt and not as executor: *Woodward* v. *Darcy.* (4)

[SIR F. H. JEUNE. That passage from Plowden seems to be merely the statement of an argument.]

The judgment is, in effect, in accordance with it. If the executor has money in his hands, it is not necessary for him to do anything to shew he has the right of retainer; but if he abandons the right he must shew an intention of abandonment. The most recent case on retainer, *Davies* v. *Parry* (5), does not affect the present question. The executor's right of retainer is a right to hold the assets of the deceased in payment of his debt. It is a right to keep the assets, and wants

(1) (1843) 2 Hare, 373.
(2) (1891) 8 Morell, 65, 67.
(3) [1898] 1 Q. B. 282.
(4) (1557) 1 Plowd. 185 a.
(5) [1899] 1 Ch. 602.

C. A. 1899

RHOADES, *In re.* RHOADES, *Ex parte.*

nothing more; the money being under his personal control, it is just as though it were in his own pocket. The debt is to be treated as paid and extinguished unless he intimates that he does not intend to exercise his right; no active assertion of the right is necessary, and if he dies before actually exercising his right, he will be presumed to have elected to have his own debt paid first: *Croft* v. *Pyke* (1), referring to a case of *Weeks* v. *Gore*. (2) So here, unless rebutted by some expression of intention the presumption is that the right is exercised—that there is an election by the executrix to retain out of the first assets coming to her hands.

[ROMER L.J. referred to Williams on Executors, 12th ed. vol. ii. pp. 1180–1, as to the effect of appointing a creditor as executor.]

The true view is that the administration order affects only such property as can properly be administered: *Hasluck* v. *Clark*. (3) The rules of administration in bankruptcy only apply to the mode of administration, and do not alter the existing rights of third parties. *In re May* (4) shews that in the administration of an insolvent estate in Chancery, to which the rules of administration in bankruptcy are made applicable by s. 10 of the Judicature Act, 1875, the executor's right of retainer is not defeated. The question, "What is the act of retainer," has never come before the Court, for the reason that the executor's right is merely a passive right—to keep what he has got; and so Vaughan Williams J. held in *In re Williams*. (5) There is no case or text-book shewing that the right depends on something being done. If an administration order under s. 125 had the effect of divesting the right of retainer, the Legislature would have surely so enacted either by the Bankruptcy Act, 1883, or by the amending Act of 1890 (53 & 54 Vict. c. 71). Since the Act of 1883 there have been numerous decisions on s. 125, but it has never been asserted until now that the operation of an administration order is to deprive an executor with assets in his hands of his right of

(1) (1733) 3 P. Wms. 180, 184.
(2) (1720) Unreported.
(3) [1899] 1 Q. B. 699, 702.
(4) (1890) 45 Ch. D. 499.
(5) 8 Morell, 65.

retainer. Though the Court may not assist an executor's right of retainer, it will not deprive him of it. On these grounds it is submitted that the payment over of the assets by this executrix to the official receiver ought not to deprive her of her right.

Levett, Q.C., in reply.

[LINDLEY M.R. The point against you is this: before any order was made the executrix had realized the assets and paid the proceeds into her own private account at her own bankers.]

The payment in to her bankers did not make her account there the less a trust account; and on the facts now before the Court, an order for payment into court could have been obtained in the Chancery Division on that very ground.

[LINDLEY M.R. I doubt very much whether anything vested in the official receiver but the balance after deducting the debt due to the executrix. That is rather supported by the judgment of Vaughan Williams J. in *In re Williams.* (1)]

In that case it was common ground that if the right of retainer could be exercised at all, it had been exercised in time: the question was, What could be affected by the right of retainer? It is clear from Wright J.'s judgment in *In re Gilbert* (2) that before the trustee appointed under the administration order steps in the executor must declare his intention to retain. This money at the private bankers of this executrix was earmarked as trust money. To have paid her own debt would have been a breach of trust.

[ROMER L.J. When she had money of her testator in her hands the debt was in fact extinguished, and she could not have proved for it.]

An executor who pays a testator's debts, but leaving a debt of his own undischarged, is not entitled to treat that debt as paid. A trustee is not bound to retain unless his cestui que trust requests him to do so; there is no such automatic retainer as has been contended for: *Sander* v. *Heathfield.* (3) As to *In re May* (4), that case is founded on *Lee* v. *Nuttall* (5),

(1) 8 Morell, 65.
(2) [1898] 1 Q. B. 282, 285.
(3) (1874) L. R. 19 Eq. 21.
(4) 45 Ch. D. 499.
(5) (1879) 12 Ch. D. 61.

C. A. 1899

RHOADES, *In re.* RHOADES, *Ex parte.*

which decided that an executor's right of retainer did not make him a "secured creditor" within s. 10 of the Judicature Act, 1875. *Hasluck* v. *Clark* (1) rather bears out the contention of the appellant.

Cur. adv. vult.

June 9. The judgment of the Court (Lindley M.R., Sir F. H. Jeune P., and Romer L.J.) was delivered by

LINDLEY M.R., who, after stating the facts, continued:— Two questions arise. The first and most important is whether the executrix had a right to retain her debt as against the trustee in bankruptcy. The second is whether, if she had, she lost this right by paying the whole 1100*l.* over to the trustee and by afterwards proving for her debt.

It is not denied that she had a right to retain and might have exercised it before the order was made, or, to be more accurate, before she knew that an application for such an order had been made. *Ex parte Gilbert* (2) settled this. But it is contended that, as she had not exercised her right before that date, she could not do so afterwards.

The older common law authorities go far to shew that if an executor was a creditor of his deceased testator and had assets in his hands sufficient to pay his debt (and all others of a higher degree, if any) such debt was treated as extinguished. Sufficient assets to pay his own debt and properly applicable thereto being in the executor's hands, such assets were treated without more as applied by him to such payment. Blackstone says so distinctly. His words are (Bl. Com. by Kerr, 4th ed. vol. iii. p. 18): "So much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose." Plowden goes further, and says that the property in the assets is changed: see *Woodward* v. *Darcy*. (3) But this can only be true if the assets spoken of can be identified and appropriated to the debt which they have satisfied, and this presupposes the exercise of the right in fact; and in the case in Plowden it had been so

(1) [1899] 1 Q. B. 699. (2) [1898] 1 Q. B. 282.
(3) 1 Plowd. 184, at p. 186.

exercised: see ibid., p. 184. [The learned judge then referred to the facts stated in the report of *Woodward* v. *Darcy* (1), and proceeded:—]

Until the executor does some act to shew which assets he retains, it is obvious that the property in them cannot be changed. This has been noticed before: see [1898] 1 Q. B. 286, and Wentworth's Office of Executor, cited in the margin of 1 Plowden, p. 185 a. But it was settled that an executor sued by a creditor could give a retainer by himself in satisfaction of his own debt in evidence under a general plea of plene administravit, and that he need not plead a retainer specially: 1 Wm. Saunders, 333, n. 6. The extent to which the doctrine that his debt was extinguished was carried is further illustrated by the cases collected in Williams on Executors, vol. ii. p. 1180, which shew that an executor, having assets sufficient and properly applicable to pay a debt due to him from his testator, could not sue the testator's heir nor any third person who might be liable with the testator for the debt in question.

It is quite plain from these authorities that the executor's right to retain assets in his hands was, as against him, treated as enforced as soon as he could properly enforce it. It would be very strange if it were held that he had lost his right because he had done nothing to assert it before there was any occasion to do so. It is only when some one seeks to take assets out of the executor's possession that it becomes necessary for him to assert his right of retainer; and, if he asserts it then, his right must be protected, unless, of course, he has released it or done something to deprive himself of it.

In the present case, when the order for the administration of the testator's estate was made, his executrix had assets in her hands to the value of 1100*l.* This sum was standing to her credit at her bankers. We attach no importance to the fact that the account was not in form opened in her name as executrix. The 1100*l.* represented the assets of the testator, and, if the executrix had herself become bankrupt, the whole of this sum would not have passed to her trustee and been distributable as her property amongst her creditors. She was,

(1) 1 Plowd. 184.

C. A.
1899

RHOADES, *In re.*
RHOADES, *Ex parte.*

Lindley M.R.

however, a creditor of the deceased for 600*l.* This is admitted. She had a right to retain this sum out of the 1100*l.* as against the other creditors of the deceased. This is quite clear. If it were to the interest of other people to say she was paid, as it might be if she was claiming interest on the 600*l.* after she had assets sufficient to pay it, the authorities shew that she could be treated as having paid herself; but then only the balance of the 1100*l.* could be treated as the testator's assets. On what principle can the trustee in bankruptcy claim more than the balance? We can discover none. The question is, What property vests in him by virtue of s. 125, clause 5? His only claim is as trustee for the testator's creditors. The property vested in him by s. 125, clause 5, has to be distributed amongst them. What they have no right to he has no right to: see s. 44 of the Bankruptcy Act, 1883. Sect. 125 does not enlarge the property to be distributed or deprive third parties of any rights which they have acquired to withdraw from distribution assets in their possession and which they have a right to retain. *Hasluck* v. *Clark* (1) shews this.

It is true that an executor with a right of retainer has not all the rights of a secured creditor: see *Lee* v. *Nuttall.* (2) He has no right to retain against creditors of a higher degree than himself; but his right to retain is a right to withdraw from the assets in his hands and distributable amongst himself and other creditors of equal degree enough to pay himself in full. His right to retain does not extend to assets which he has not got in and which are not in his possession, nor to equitable assets; but no question as to them arises here. His right extends both in law and in equity to all legal assets which he has in his hands, and there is nothing in s. 125 to deprive him of this right. The judgment of Vaughan Williams J. in the case of *In re Williams* (3) supports this conclusion.

Mr. Levett relied on authorities collected in Williams on Executors, vol. i. p. 885, which shew that if an executor dies without having exercised his right his executor cannot exercise it unless he also represents the testator. But what-

(1) [1899] 1 Q. B. 699.
(2) 12 Ch. D. 61.
(3) 8 Morell, 65.

ever difficulty there may be in reconciling these cases with Blackstone's statement above referred to, they are quite consistent with the right of the executrix to retain her debt as against the trustee claiming her testator's assets. A similar observation applies to Wigram V.-C.'s judgment in *Burge* v. *Brutton*. (1) The only person who has a right of retainer is the legal personal representative of the testator; and if such representative is dead, his representative cannot himself first exercise the right unless he also represents the testator: *In re Compton*. (2) This doctrine has no application to this case. There is no analogy between death and an order for administering assets in bankruptcy under s. 125 of the Bankruptcy Act.

For these reasons we have come to the conclusion that the executrix in this case had a right to retain her debt out of the assets in her hands as against the appellant; and that only the balance of those assets vested in him under s. 125, clause 5.

The second question presents no real difficulty. The executrix, not knowing her rights, paid the whole 1100*l.* over to the trustee. He, however, has not distributed the assets, and no injustice will be done to him or to any one if he is ordered to repay to her the amount which she was entitled to retain. *Ex parte James* (3) and *Ex parte Simmonds* (4) are distinct authorities to shew that mistakes of this kind, although attributable to ignorance of law, can and will be set right by the Court so long as the officer of the Court still has the money in his hands. Still less can the proof by the executrix in the bankruptcy, withdrawn, as it was, when she discovered her error, deprive her of her right to have her money back.

The judgment appealed from is right on all points, and the appeal, therefore, must be dismissed with costs.

Appeal dismissed.

Solicitors: *Adams & Adams; Thomsons, Brooks & Danby.*

(1) 2 Hare, 373.
(2) 30 Ch. D. 15.
(3) (1874) L. R. 9 Ch. 609.
(4) (1885) 16 Q. B. D. 308.

G. I. F. C.

1899
June 29;
July 4.

IREDALE AND ANOTHER *v.* CHINA TRADERS INSURANCE COMPANY.

Ship—General Average—Sacrifice of Freight.

Shippers chartered a ship to carry a cargo of coals from Cardiff to Esquimault. In the course of the voyage the coal heated to such an extent that if the ship had continued her voyage the ship and cargo would have been totally lost. The master, for the safety of all concerned, put into a port of refuge and landed the coal, which was subsequently surveyed and found to be in such a condition as to be incapable of being carried with safety to its destination. The master accordingly abandoned the voyage, and the chartered freight was lost:—

Held, that the freight had not been sacrificed under such circumstances as to make the loss the subject of general average contribution.

TRIAL before Bigham J. without a jury upon the following agreed statement of facts.

The plaintiffs own the iron ship *Lodore*, and by charter dated February 10, 1897, chartered her to load coals at Cardiff for Esquimault at 19*s.* 9*d.* per ton delivered. By a policy dated March 3, 1897, they insured the chartered freight thereunder, valued at 1650*l.*, with the defendants, against, inter alia, loss by fire and all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the aforesaid freight.

The *Lodore* proceeded to Cardiff and there loaded a full cargo of coals, and sailed on March 29, 1897, on the insured voyage. On May 26, 1897, the coals began to heat, and the master decided, for the safety of the ship, freight, and cargo, to jettison cargo and to bear up for the river Plate. About forty tons were jettisoned, and the *Lodore* subsequently anchored in Buenos Ayres Roads on May 29, 1897. Between that date and June 25, 1897, cargo was from time to time discharged, and various surveys were held upon the coals, and it was found that the coals continued hot and would heat still further if the voyage was proceeded with. Accordingly, on June 25, 1897, the coals were condemned, and were ultimately sold. The

vessel abandoned her voyage to Esquimault and returned to the United Kingdom with another cargo, and the chartered freight was totally lost.

It was necessary for the safety of the whole adventure for the vessel to put into Buenos Ayres as aforesaid, and it was reasonably certain that if she had continued on her direct voyage the temperature of the coal would have continued to rise until spontaneous combustion ensued, and that, had she so continued her voyage, the ship and cargo would have been destroyed by fire before reaching Esquimault. When and while she was at Buenos Ayres the ship and her cargo, both the portions landed and the portion remaining on board, were in safety, but after she reached Buenos Ayres no part of the cargo could have been reloaded $\frac{\text{and}}{\text{or}}$ carried with safety to Esquimault in the same or another bottom, and it was all necessarily and properly sold at Buenos Ayres.

The policy and charterparty, the protest dated August 11, 1897, and the average statement dated March 15, 1898, with the survey reports as therein set out, may be referred to as parts of this special case.

This action, in the defence to which all underwriters interested similarly to the defendants concur, is defended to test the question whether, by way of set-off and deduction from the total loss on the policy, which is admitted, the defendants are entitled to have the said loss of freight made good in general average to any and what extent, and to deduct the contribution to the same falling on the plaintiffs as shipowners, from the amount due on the policy.

It is not intended to allege or rely on improper condition of cargo as a defence to any claim there may be.

The Court is to have power to draw all necessary inferences of fact, and the parties agree to leave the adjustment of figures on such principle as may be laid down to an average adjuster.

Joseph Walton, Q.C., and *J. A. Hamilton*, for the plaintiffs.

Carver, Q.C., and *Scrutton*, for the defendants.

The arguments sufficiently appear from the judgment.

1899

IREDALE v. CHINA TRADERS INSURANCE COMPANY.

The case of *The Knight of St. Michael* (1) was referred to in addition to those mentioned in the judgment.

Cur. adv. vult.

BIGHAM J. The question in this case is whether the freight of the plaintiff's vessel *Lodore* was sacrificed in such circumstances as to make the loss the subject of general average contribution. The facts have been agreed by the parties. [The learned judge read the agreed statement of facts.] I have read and carefully considered the documents incorporated with this case, and I have drawn from all the facts the inference that before the master of the vessel decided to alter his course and make for Buenos Ayres the freight on the coals was completely lost. I am satisfied that the condition of the coals at and before that time was such that it had become impossible to carry them to their destination so as to earn any freight at all. Their inherent heat would have completely destroyed them long before their arrival at Esquimault. This inference of fact appears to me to dispose of this case, because the law is plain that where the thing sacrificed is already valueless at the time of the general average act there can be no claim to contribution. Nothing of value is sacrificed, and therefore there is nothing to contribute to. Why was this freight lost? Not because it was sacrificed, but because the cargo could not be reshipped. And why could it not be reshipped? Because long before the alleged average act (the abandonment of the voyage) the coals had got into such a condition as to be unfit for carriage. The freight in fact was lost by fire (a peril insured against by the defendants) and not by any general average act at all.

The case was supposed to raise some questions of law not covered by authority; but, for my part, I do not think it does. It involves the finding of an inference of fact, which, once found, leaves nothing further to be determined.

It was said by Mr. Carver that the case was like that of a voluntary stranding in the face of a danger of foundering so imminent as to render the saving of the adventure hopeless; or

(1) [1898] P. 30.

like the cutting away of a mast in similar circumstances. He said that in such cases the loss of the vessel or the loss of the mast is a general average loss, and that it is none the less so because before the average act the thing sacrificed (the ship or the mast) had practically gone in the sense that it was involved in a hopeless peril. I agree with him that by our law such losses are the subject of general average; but I do not agree with him that such cases are like the case now before the Court. In the illustrations given there is always an element of uncertainty. Mr. Lowndes, in his work on General Average, 3rd ed. p. 24, says: "The captain cannot tell but that, in his last extremity, a sudden shift of wind, or a lull of the storm, or, if drifting ashore, some undercurrent unknown to him, may unexpectedly bring him out of danger. He can hardly ever be quite certain of destruction until his ship has been destroyed, and he substitutes a certain loss of part for a probable loss of all." If in the present case it could be said that when the captain abandoned the voyage there was a chance, even a remote chance, of earning the freight by carrying forward the cargo, then I should be of opinion that the freight was sacrificed in such circumstances as to give rise to a general average claim. The element of doubt which exists in the cases supposed by Mr. Carver would then be present, and would make all the cases alike. Mr. Walton contended that even if this element of doubt did exist, and there was a chance or a hope of successfully bringing forward the cargo and so earning the freight, yet the sacrifice of that chance or hope gave no claim to contribution, because the other interests were at the moment out of danger, the ship being in port and discharged, and the coal being safe on the quay; so that the sacrifice could not be described as a sacrifice for the general benefit. But I do not think that this is a sound contention. Though the cargo and ship were physically separated, the maritime adventure was not at an end; the intention to prosecute the voyage still existed, and in fact the putting into Buenos Ayres and the discharge were all done with the object of continuing the voyage in safety. The obligation of the master, therefore, to make such sacrifices as might be necessary for attaining that object still existed, and

1899

IREDALE v. CHINA TRADERS INSURANCE COMPANY.

Bigham J.

if any such were made they would be in the general interest and the subject of contribution: see *Whitecross Wire Co.* v. *Savill.* (1) The real difficulty in cases like the present is to ascertain the facts. Was the thing which is said to have been sacrificed absolutely lost or not before the general average act was done? I think this question ought to be answered by reference to the circumstances as they appeared at the time of the average act, and not by reference to events as subsequently ascertained. Thus, in the present case it was admitted by the plaintiffs that the loss of the freight on the forty tons of cargo jettisoned at sea was a general average loss; and I think it was rightly admitted, because, although it was subsequently ascertained that the freight was at this time wholly lost, the circumstances as then known did not justify that conclusion, and thus the captain may be properly said to have substituted a certain loss of part for a probable loss of the whole of the adventure, so as to give rise to a general average claim. In *Shepherd* v. *Kottgen* (2) the real difficulty with which the Court had to deal was one of fact. The case turned entirely on the effect of the finding of the jury. When once the significance of that finding was ascertained, the difficulty in applying the law disappeared. The facts in that case were as follows: The mast of a ship had by a storm been reduced to such a state that it was merely worthless wreckage. In this condition it encumbered the deck and constituted a common danger. It was therefore cut adrift and thrown overboard. The question was whether the shipowner could claim contribution, and it was held that he could not because the thing thrown away was already worthless. If the arguments are examined it will be seen that it was conceded that to constitute a claim to general average the thing sacrificed must be of some actual or potential value at the time of the sacrifice; and both Bramwell L.J. and Brett L.J. in their judgments make the point clear and place it beyond doubt. The former said: "Where the thing destroyed has some peculiar condition attached to it so that it will be lost whether the whole adventure is saved or not, then its destruction cannot be deemed a sacrifice." And Brett L.J.

(1) (1882) 8 Q. B. D. 653, at p. 661. (2) (1877) 2 C. P. D. 585.

said: "Where, whether the act relied upon as the act of sacrifice had been done or not, the thing in respect of which contribution is claimed would, by reason of its own state or condition, have been of no value whatever, or would have been certainly or absolutely lost to the owner although the rest of the adventure had been saved, there is nothing lost to the owner by the act, and therefore there is nothing sacrificed, that is to say, there is no sacrifice."

Mr. Carver relied upon the case of *Pirie* v. *Middle Dock Co.* (1) That was a case in which the ship was carrying a cargo of coal to Singapore. During the voyage a fire broke out in the coals and water was poured upon the burning portion to put out the fire. This water wetted the remainder of the coal. The vessel put into a port of refuge, and it was there discovered that the whole of the coal not affected by the fire was "so damaged by the saturation with water that it was practically impossible to forward it to its destination." The voyage was therefore abandoned, and the question was whether the consequent loss of freight should be contributed to in general average. The answer turned on the consideration of one point only, which is clearly stated by Watkin Williams J. in his judgment (2): "It seems to me that the only question in the case is whether the operation of pouring the water on the coals . . . . and so rendering them unfit to be forwarded to their destination—causing a total loss of the freight to be earned by their delivery at their destination—can be considered as a voluntary sacrifice of the freight of the coals so wetted within the true principles of general average." Apparently it had been argued at the bar that the case was not one of general average because there was in fact no sacrifice of cargo and its incidental freight, inasmuch as the cargo having taken fire was practically already lost past redemption. Having stated this contention, the learned judge proceeded to deal with it. He disposed of it however, not by applying any principle of law, but by finding as a fact that the pouring of the water on the burning coal involved a sacrifice of the freight on the remainder of the coal (see the end of his judgment). In other words, he found that at the time of the

(1) (1881) 44 L. T. 426.

(2) 44 L. T. at p. 428.

1899

IREDALE v. CHINA TRADERS INSURANCE COMPANY.

Bigham J.

general average act the freight of the coals which were not burning might still possibly have been earned, and was therefore not, as contended, already lost. The argument was thus disposed of on a finding of fact. When properly examined the judgment of the learned judge seems to me to be an authority against the defendants in the present case, because in dealing with the conditions which must concur in order to give rise to a claim for contribution, he says that the sacrifice "must be a real sacrifice and not a mere destruction or casting off of that which had become already lost and consequently of no value." (1) He thus admitted the correctness of counsel's contention as to the law, but, as I have pointed out, he so found the facts as to make the contention inapplicable to the case.

I was also referred to the American case of the *Columbian Insurance Co.* v. *Ashby*. (2) In that case the ship had been voluntarily stranded. The act was done for the safety of the crew and of the vessel and cargo. The vessel could not be got off the bank; she was totally lost, and so the adventure was frustrated. The argument apparently was that the sacrifice, to come within the rules applying to general average, must be a sacrifice which benefits all the interests at stake, and that therefore a sacrifice which results in the total destruction of one of those interests is not the subject of contribution. Story J. disposes of the argument. He says: "Surely the question of contribution cannot depend upon the amount of the damage sustained by the sacrifice, for that would be to say that if a man lost all his property for the common benefit he should receive nothing, but if he lost a part only he should receive full compensation." (3) And he goes on to point out that it is the safety of the property and not the voyage which constitutes the true foundation of general average, and that therefore the fact that the general average act had the effect of putting an end to the voyage was immaterial. I did not understand Mr. Walton to contend that the fact of the loss of the whole freight took the present case out of the scope of general average; and if he did not so contend, I do not see how the

(1) 44 L. T. at p. 430. (2) (1839) 13 Peters, 331.
(3) 13 Peters, at p. 339.

American authority affects the consideration of the question now before the Court. If, however, he did so contend, it is sufficient for me to say that I do not agree with him. I believe the English law on the point to be the same as that laid down by Story J. In the American case it was further decided that, the freight having been totally lost by the voluntary stranding and consequent total loss of the vessel, the freight so lost should form the subject of contribution. This ruling does not however in any way affect the decision of the case in hand. The freight was an existing valuable property at the time of the stranding and was sacrificed by the general average act.

The conclusion I come to is that at the time the master abandoned the voyage the freight was already hopelessly lost, and cannot therefore be said to have been sacrificed at all. There will be judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

J. F. C.

C. A.
1899
July 5.

[IN THE COURT OF APPEAL.]

STEAMSHIP ISIS COMPANY AND OTHERS *v.* BAHR, BEHREND & ROSS.

Ship—Charterparty—Full and Complete Cargo—Cargo in Frozen Condition—Decrease of Amount that could be Stowed.

In an action against charterers for not loading a full and complete cargo of wet woodpulp, it appeared from the charterparty that the contemplated loading was to be in midwinter, at which time, as the evidence shewed, wet woodpulp arrived at the port of loading, and was loaded, in a frozen condition. In this condition it would not stow so closely as when unfrozen, and consequently a lesser amount could be loaded than if the pulp had been in a normal condition:—

Held, by A. L. Smith and Rigby L.JJ., that the charterers in loading as much wet woodpulp in a frozen condition as the ship would carry had performed their obligation to load a full and complete cargo:

Held, by Vaughan Williams L.J., that, to relieve the charterers from liability, it was not enough to shew that wet woodpulp was habitually loaded in winter in a frozen condition, but it must also be shewn that cargoes so loaded were accepted as full and complete cargoes, and that as there was no evidence of such a custom the defendants were liable.

APPEAL from a judgment of Bruce J. at the trial without a jury.

The action was by shipowners against charterers for loading less than a full and complete cargo.

The defendants counter-claimed for the cost of carriage of the cargo from cars to the vessel.

By the charterparty of December 22, 1897, the *Isis* "due Halifax 21st inst., and expected ready for loading there at the end of this week" was to proceed to Bangor (Maine) and load "a full and complete cargo of wet woodpulp which contains about 50% of water which the freighters bind themselves to ship . . . . and shall therewith proceed to Manchester . . . . at the freight of 17*s.* per 1016 kilos. intake weight of wet woodpulp . . . . to be loaded ex cars from alongside steamer at ship's expense. . . . The cargo to be brought to and taken from alongside the ship at merchant's risk and expense. . . . Should ice prevent the steamer from reaching Bangor then charterers to

load the steamer at Bucksport on the same terms as stipulated for Bangor, should there be any danger during loading at Bangor of ship being frozen in she shall be allowed to proceed to Bucksport and charterers to complete cargo there. Charterers to have liberty to cancel charter if steamer not ready for loading by latest January 10th, 1898."

Bangor is situated on the river Penobscot, Maine, in the United States of America, and Bucksport is on the same river about twenty miles below Bangor. The ship loaded at Bucksport. There are two kinds of wet woodpulp, which may be distinguished as chemical and mechanical respectively. The chemical pulp is packed in square bundles compressed by hydraulic pressure; the mechanical in bundles of folded sheets of pulp, tied together but not wrapped up. A small portion of the cargo consisted of chemical pulp, the stowing of which was not affected by frost. The larger portion of the cargo consisted of mechanical pulp which, when moist, is soft and flexible, and can easily be stowed, and when stowed is compressed by the weight above it, but when frozen the bundles will not compress, and a much smaller quantity can be stowed than is the case when the pulp is unfrozen. The vessel arrived at Bucksport on January 6, 1898, and the pulp delivered for shipment was frozen hard, and, consequently, the steamer was prevented from loading within 440 tons of her usual quantity of cargo.

With regard to the counter-claim, the facts were that the pulp was brought by rail and the nearest car was seventy feet from the ship, the other cars being successively at greater distances. The shipowners refused to take delivery from the cars so placed, and the charterers carried the pulp in sleighs to the vessel and counter-claimed for the expense of so doing. There was evidence of a custom that delivery in cars from the end of the nearest rail is treated as delivery "alongside in cars."

The learned judge gave judgment for the plaintiffs on the claim and counter-claim.

The defendants appealed.

June 8. *Joseph Walton, Q.C.*, and *Pickford, Q.C.* (with them *Collingwood Hope*), for the defendants. The expression "wet

C. A. 1899

STEAMSHIP ISIS COMPANY v. BAHR & CO.

woodpulp" is a description of a particular article of commerce. The parties contemplated the shipment being in winter, at which time they must have known that the pulp would be frozen. What the charterers shipped was this article of commerce in the ordinary condition in which it is when shipped in winter. It does not in such a case stow so closely as if it were unfrozen, but that is a matter to be taken into account in fixing the freight. The charterers have discharged the obligation on them to load a full and complete cargo, and they are not responsible for the shortage. As to whether the cargo was delivered alongside, the meaning of that expression is that the cargo must be delivered as near the ship as is practicable. It is a question of fact whether that has been done. If it has, the shipowners must do the rest. The defendants are entitled on the counter-claim to the money they claim, as the cars arrived as near to the end of the nearest rail as was practicable.

Horridge, and *A. H. Maxwell*, for the plaintiffs. The charterers have not complied with their obligation under the charterparty to load a full and complete cargo. They delivered frozen pulp and not wet woodpulp. They ought to have delivered the pulp in the condition in which it came from the manufactory, and they might have delivered a full cargo either by taking precautions against the pulp freezing, or by delivering chemical wet woodpulp, or by making up the mechanical woodpulp in parcels that would have stowed whether frozen or not. It is not correct to say that the parties must have known there would be frost. No doubt there was a chance of frost, and they provided for that by giving an alternative port of loading; but the charterparty is silent as to any effect frost may have in lessening the amount of cargo that could be stowed.

[They cited *Grant* v. *Coverdale* (1); *Hudson* v. *Ede*. (2)]

As to delivery alongside, if every truck had come to the end of the line the case might be different; but only one came to that point, the others being on the line beyond it, and it is

(1) (1884) 9 App. Cas. 470.
(2) (1867) L. R. 2 Q. B. 566; (1868) L. R. 3 Q. B. 412.

impossible to regard delivery from trucks so situated as delivery alongside the vessel.

Pickford, Q.C., in reply.

Cur. adv. vult.

July 5. A. L. SMITH L.J. read the following judgment:—This is an action by shipowners against charterers for loading on board the plaintiffs' steamship a cargo less than a full and complete cargo by 440 tons, whereby the plaintiffs lost freight to the amount of 336*l.* There was also a counter-claim by the defendants against the plaintiffs to recover the sum of 36*l.*, which I will deal with presently. The case came to trial in the commercial list at Liverpool before my brother Bruce, who found for the plaintiffs upon claim and counter-claim, and the defendants, the charterers, appeal.

By charterparty made at Liverpool and dated December 22, 1897, the defendants agreed to load a full and complete cargo consisting of "wet woodpulp which contains about 50% of water" in the plaintiffs' steamship at Bangor (Maine, United States), to be carried from there to Manchester at the freight of "17*s.* per 1016 kilos. intake weight of wet woodpulp"; and in this charterparty it was stated that the ship was due at Halifax on December 21, 1897, and was expected ready for loading there at "the end of this week," i.e., at the end of the week in which was December 22, 1897.

By this charterparty the defendants had liberty to cancel the charter if the steamer was not ready for loading by latest on January 10, 1898, and it was thereby also agreed that should ice prevent the steamer from reaching Bangor, or should there be danger of her being frozen in whilst loading there, the ship should be allowed to proceed to Bucksport, and that the charterers should load her there on the same terms as at Bangor. Bucksport is also in the state of Maine in the United States of America.

It was further agreed by the charterparty that the cargo was to be loaded by the steamship "ex cars from alongside steamer at ship's expense." It is this clause which gives rise to the defendants' counter-claim.

C. A.
1899

STEAMSHIP ISIS COMPANY v. BAHR & Co.

A. L. Smith L.J.

That the loading and voyage of the ship contemplated by this charterparty was a midwinter loading and voyage cannot be doubted, and that frosts were also contemplated by the parties is to me clear, and that intense frosts at this period of the year in fact existed at Bucksport, where the ship took in cargo, was proved by the uncontradicted evidence of the captain of the ship called on behalf of the plaintiffs, who stated that when loading "there was any amount of frost and snow —when it is 14° below zero it is cold enough."

The complaint made by the plaintiffs in this action is that the cargo, which was to consist of "wet woodpulp which contains about 50% of water," was frozen hard when tendered for shipment, and consequently did not pack so close in the ship's hold as unfrozen wet woodpulp would have done, and thus 440 tons of cargo were shipped less than would have been the case had the wet woodpulp tendered for shipment been unfrozen.

There are two kinds of wet woodpulp, one containing about 50 per cent. of water, which is called mechanical wet woodpulp, and which my brother Bruce calls the coarser and less expensive kind, and the other which is called sulphide or chemical wet woodpulp (the more expensive kind), which contains a somewhat larger percentage of water than the former. Both are wet woodpulp which contains 50 per cent. or more of water. Certificates of witnesses were put in as evidence by the charterers with the consent of the plaintiffs (this being a commercial cause), and I will cite from one of the certificates, namely, that of Mr. Day, as typical of the others, to shew in what state wet woodpulp is shipped in the State of Maine, United States, in the winter. He states: "I have shipped large quantities of pulp in winter; it is always shipped in a frozen condition, for as it contains 50 per cent. of water it freezes during transportation from mill to seaboard, and a vessel loading in winter cannot possibly make as good stowage as one loading in warm weather." This statement is in no way contradicted by the shipowners, and must therefore be taken as proof of what is certified therein.

Now, in this charterparty, which was clearly to cover a shipment of wet woodpulp in the dead of winter, what was the cargo which was contracted by it to be tendered for shipment

by the charterers? Was it an unfrozen wet woodpulp cargo, as is now set up by the shipowners, or a frozen wet woodpulp cargo, as such cargoes always are at Bucksport in the winter? This is the question. If it was to be unfrozen, where, I ask, was it to come from with frost of 14° below zero? There is not even a suggestion made by the shipowners as to this, and, much less, evidence that an unfrozen cargo could have been shipped in winter, either at Bangor or Bucksport. It appears to me, when the facts are ascertained, there can be but one answer, and that is, that the contracted cargo which the defendants were to tender to the ship was that which they did tender, namely, a full and complete cargo of wet woodpulp containing 50 per cent. of water, in its winter normal condition. At one time there appears to have been a point made by the shipowners that the charterers had improperly packed the mechanical or coarser wet woodpulp, and that this had been a cause of the short shipment complained of; but the point was not made before us, nor was it apparently insisted upon before Bruce J., for he says in his judgment: "The charterers provided for shipment a full and complete cargo, and the shipment of a full and complete cargo was only prevented by reason of the frozen condition of the bales" of what he calls "moist ground woodpulp," i.e., of the mechanical or coarser pulp.

I cannot read the charterparty, knowing as we do the surrounding circumstances which are legitimate evidence, as being a contract by the charterers to tender for shipment woodpulp which was wet and unfrozen, as the shipowners now contend to be its meaning, and I hold that it is not its meaning. In my judgment the evidence shews that at Bucksport a customary full and complete cargo in winter consists of frozen wet woodpulp.

My brother Bruce in his judgment says the charterers "have the control of the cargo, and they are bound to provide for shipment a cargo in the ordinary condition in which cargoes of the kind stipulated for are shipped." I agree in this, if the learned judge had added thereto the words, "in winter and summer respectively"; but without the addition of these words, with all respect, I cannot agree with him.

C. A. 1899

STEAMSHIP ISIS COMPANY v. BAHR & CO.

A. L. Smith L.J.

The sulphide wet woodpulp, i.e., the more expensive description which, under the charterparty, the charterers had the option if they desired of shipping, and some of which they in fact did ship, was, according to the evidence of the plaintiffs' captain, in bundles and slightly frozen, which bundles were perfectly square, and, consequently, made better stowage than the mechanical wet woodpulp which the defendant had also the option of shipping. They were not, however, bound to ship sulphide pulp.

In my judgment, for the reasons above, the claim of the plaintiffs for the 336*l.* for short shipment fails, for the defendants, the charterers, tendered for shipment a full and complete cargo of that which they had contracted to tender, and I think judgment must be entered for the defendants upon this claim of the shipowners.

As to the 36*l.*, which is a counter-claim by the defendants against the shipowners for having had to pay for carrying in sleighs the wet woodpulp tendered from the cars to the ship, in my judgment this claim fails the defendants, and I agree with my brother Bruce thereon; but as to this I am content to place my judgment upon the ground that the custom set up by the defendants, even if admissible in evidence, fails in proof, for the custom set up is that delivery in cars from end of nearest rail is considered at Bucksport delivery "alongside in cars"; whereas it was proved that only one car ever got to the end of the nearest rail, which was about seventy feet from the ship's side, and that the rest of the cars never got there at all, and that some of them were as far as 100 yards from the ship's side, in addition to the seventy feet from the end rail to the ship's side.

The custom failing in proof, the charterers have not delivered the cargo "to be loaded ex cars from alongside steamer" pursuant to the charter, and are, therefore, not entitled to claim the 36*l.*, as they do from the shipowners, for having paid for hauling the cargo in sleighs from these cars to ship, for this was not a ship's expense under the charter. As to this claim for 36*l.* by the defendants, judgment must be entered for the plaintiffs upon the counter-claim, as my brother Bruce has entered it,

with any costs which upon taxation are found to be attributable thereto; but as to the claim for 336*l.*, judgment must be entered for the defendants with costs of suit here and below.

RIGBY L.J. read the following judgment:—Two points arise for decision on this appeal.

1. Whether in accordance with a charterparty dated December 22, 1897, the freighters did or did not provide for the steamer a full and complete cargo of wet woodpulp containing about 50 per cent. of water.

2. Whether the freighters are entitled to recover on their counter-claim 7 cents per ton, or 36*l.* 2*s.* 1*d.* in all, paid by them for removing the cargo from the railway to the wharf alongside the steamer.

The two points are entirely independent of one another. The charterparty was executed in Liverpool by Messrs. Bahr, Behrend & Ross, ship-brokers, as agents as well for the freighters as for the owners. It was (with written additions and variations) on a printed form plainly kept by the brokers for cases in which they intervened, on behalf of the same freighters, to charter the vessels of different owners for the carriage of woodpulp. The printed form provided for the freight (per 1016 kilos.), at rates to be inserted, of two kinds of woodpulp, wet and dry, and so might be made available for the cases of both or either of these being intended to form part of the cargo. In the present case, the words referring to dry woodpulp were struck out, and the description of the cargo to be furnished was altered from "woodpulp" in the printed form to "wet woodpulp which contains about 50% of water." This is the only description of the cargo contained in the charterparty, and there is nothing whatever in the document to modify the description. The freighters could, therefore, perform their duty as to the supplying of a full and complete cargo if they delivered as much as the ship could stow of wet woodpulp packed in the usual and ordinary manner. Now, it clearly appears from the evidence that there are two kinds of wet woodpulp—namely, one in which the wood is subject only to mechanical means for producing the fibre, and another in

C. A. 1899

STEAMSHIP ISIS COMPANY v. BAHR & Co.

Rigby L.J.

which the wood is acted upon by some chemical agent such as a bisulphide. These two kinds may be called for distinction "mechanical" and "chemical," or by some other names distinguishing the processes by which the pulp is produced, but both of them are included under the description wet woodpulp as distinguished from dry woodpulp.

The freighters offered both of these kinds of wet woodpulp as part of the cargo, as they had a clear right to do, exhausting all the chemical wet woodpulp that they wished to ship and then going on to supply mechanical wet woodpulp, until the master of the steamer refused to receive any more on the ground that he had no further storage room, as was the fact. Primâ facie, therefore, the freighters' duty to provide cargo was fully performed. No objection was taken to any part of the cargo supplied on the ground that it did not contain the proper percentage of water; but it was stated at the bar, and not disputed, that the chemical wet woodpulp contained a somewhat larger percentage of water than the other.

By their statement of claim, paragraph 3, the owners set up that the freighters did not load proper or usual wet woodpulp, but improperly loaded bundles of ground woodpulp which were frozen hard, and frozen into different and unusual forms and shapes. They further, in the same paragraph, complained that the freighters did not roll up such pulp into proper square bundles, secured by paper and string, but supplied the same in loose and unsecured rolls, and in rolls and bundles of varying and unusual shapes.

In this paragraph the phrase "ground woodpulp" manifestly means woodpulp produced by grinding—i.e., mechanical woodpulp; so that the complaint does not extend to that part of the cargo which consisted of chemical wet woodpulp. Indeed, it was plain upon the evidence that the chemical pulp was made up, as is usual with that class of pulp, in square bundles, pressed by hydraulic pressure and secured by paper and string, and, so far as the form of the bundles is concerned, the complaint resolves itself into the charge that the mechanical pulp was not packed into bundles like those of the chemical pulp. The evidence, however, shewed that the mechanical pulp was

invariably packed in precisely the same manner as that in which the bundles delivered by the freighters were packed, and not in the way in which the chemical pulp was packed. Of the whole charge, therefore, nothing remains except that the pulp was frozen. So far as regards the chemical pulp, this created no difficulty in the stowage. With reference, however, to the mechanical pulp, it was conceded that in the frozen state the bundles could not be packed so close when frozen as when unfrozen, and, apparently, as to the whole cargo, when bundles were stowed one above another, there would, if the pulp were unfrozen, be some settlement which would permit of a larger cargo being shipped in the unfrozen than in the frozen state. The question, then, is whether the pulp in the frozen state was in all the circumstances a sufficient delivery. It has already been noticed that the only description of the cargo is contained in the words "wet woodpulp which contains about 50% of water." This is opposed to dry woodpulp, and the two categories exhaust all woodpulp. There is no room for a third category which would neither be wet nor dry. Nor could the pulp containing about 50 per cent. of water ever become dry woodpulp, for the fundamental distinction is founded on the actual composition, and every witness treats the pulp which contains the 50 per cent. as being still wet pulp even though frozen. It would be absurd to suppose that an order for dry woodpulp could be satisfied by delivery of frozen wet pulp; but, on the other hand, there is no difficulty in supposing wet woodpulp to be deliverable as such, even though it be frozen, unless there were some usage in the trade to forbid it. The evidence, however, is altogether against this. All the witnesses treat the frozen wet pulp as being still wet pulp according to the understanding of the trade. But before going into this in detail, I will examine further the charterparty in order to be able to deal with an argument on behalf of the owners founded upon it.

The date of the charterparty was, as noticed above, December 22, 1897. The cancelling clause gave the charterers liberty to cancel if steamer not ready for loading by at latest January 10, 1898. It was, therefore, clear that a loading in the depth of winter and no other was in contemplation.

C. A.
1899

STEAMSHIP ISIS COMPANY v. BAHR & Co.

Rigby L.J.

The loading port was to be Bangor, subject to a proviso, the material part of which is to the effect that, should ice prevent the steamer from reaching Bangor, then the charterers were to load the steamer at Bucksport on the same terms. Bangor and Bucksport appear from the atlas to be inland ports on the river Penobscot, Bucksport being something less than twenty miles below Bangor. As this proviso was acted upon, it is plain that severe frost was expected. As the loading, whether at Bangor or at Bucksport, was to be ex cars, the inference is that in each case the cargo was expected to arrive by rail. There is a railroad from Bangor to Bucksport, by which the cargo was no doubt to be carried if Bucksport became the loading port. There is no suggestion of any terminus a quo above Bangor from which it was to come if that were the loading port, other than the inland mills where the pulp was to be manufactured. At any rate for a portion, and it may be for the whole, of the distance from the mills, the woodpulp was to be exposed to frost, and, if there had been any intention to prohibit the delivery of frozen pulp, one would have expected, independently of any evidence of usage, that the owners, who now say that the delivery was prohibited, would make that out from the charterparty. Having regard, however, to the evidence as to usage, it is, to say the least, very doubtful whether the owners would have wished to make an express provision to that effect, and quite certain to my mind that a provision of the kind cannot be implied. So far as we know from the evidence, the transatlantic export trade in woodpulp takes place from two centres—Portland, by way of Portland Bay, in the State of Maine, and Bangor, or alternatively Bucksport by way of Penobscot river and bay. There is no suggestion that the climatic difference of these ports is so great as materially to affect the circumstances of the winter trade. Yet we find Mr. Day, who for eight years or so down to March, 1897, had been president of the Moosehead Pulp and Paper Company of Embden, Maine, saying, in a declaration dated April 29, 1898, which by consent has been admitted in evidence: "The annual product of the company's mill was 24,000 tons of wet mechanical woodpulp. Much of our produce was exported. During some

periods, owing to market conditions, the major part of it was shipped to England. We loaded vessels at the ports of Portland and Bangor, Maine. The export business was directly under my charge. Mechanical woodpulp is shipped wet, in bundles containing 100 pounds, wet weight; these bundles are always composed of a number of folded sheets of pulp (usually about 50 per cent. air dry), tied with a small rope or string and unwrapped. This has always been and is the method of preparing and shipping export pulp. I have shipped large quantities of pulp in winter. It is always shipped in a frozen condition, for, as it contains 50 per cent. of water, it freezes during transportation from mill to seaboard, and a vessel loading in winter cannot possibly make as good stowage as one loading in warm weather."

Again, Mr. Deering, of Portland, Maine, in his declaration dated April 30, says: "I am collector of customs for the port of Portland, Maine. I have been for many years senior partner of the firm of Deering, Winslow & Co., of Portland, Maine. During the years 1893 and 1894 a large quantity of mechanical woodpulp was exported from the port of Maine. The firm of Deering, Winslow & Co. acted as forwarders for inland mills. I am familiar with the export of mechanical woodpulp. It is shipped in one hundred (100) pound bundles, tied with stout twine or gisal yarn. The pulp as shipped contains substantially half water. Wet mechanical woodpulp is shipped from this port in winter, and I have frequently had occasion to examine this pulp while vessels were loading. In cold weather it nearly always arrives from the mills in a frozen condition, and cannot be made to stow on cars or vessels as well as in summer, when not frozen."

The three witnesses—Snowman, Cassidy, and Stewart—all concur in describing the pulp shipped by the freighters as wet woodpulp, notwithstanding its frozen condition, and our attention was not called to any conflicting evidence. The last three witnesses also concur in the statement that the way in which the mechanical pulp was packed was the usual and ordinary mode of packing mechanical pulp.

On this evidence, even if it were not clear without it, I am

C. A. 1899

STEAMSHIP ISIS COMPANY v. BAHR & CO.

Rigby L.J.

of opinion that the parties to the charterparty must have gone upon the basis that in all probability the wet woodpulp would be shipped in a frozen condition. To ship it in that condition must, therefore, be taken to be a due performance of the duty of the freighters to load.

As to the claim for a return of 7 cents per ton for carriage of the pulp between the rail and the ship, I would first observe with reference to the admission of evidence without having the witness presented for cross-examination, as is now common in the Commercial Court, the practice goes of course upon the basis that all the witnesses are to be assumed to be honest witnesses. It would, however, be dangerous to extend by implication what the witnesses have actually said except in the clearest cases. I cannot see that the witnesses have clearly stated the usage to be that the ship is bound to take pulp from any car except one occupying the nearest part of the rail to the ship—about seventy feet of distance between the rail and the ship. In this case the distance of some of the cars was said to be as much as 300 feet. The defendants, upon whom fell the burden of proving their counter-claim, have failed in making it out, and the counter-claim ought to be dismissed.

VAUGHAN WILLIAMS L.J. read the following judgment:—The obligation of the charterers is to load a full and complete cargo of wet woodpulp which contains about 50 per cent. of water.

The first question is, Was that which was tendered "wet woodpulp"? I think it was, because I do not think that these words mean that the woodpulp was to be in a wet condition. I think that the words mean that the cargo is to be something which is commercially known as "wet woodpulp"—as distinguished from "dry woodpulp"—and I think that although this cargo tendered was not wet, because it was frozen, yet it was what is commercially known as "wet woodpulp."

The second point made is that this cargo, although consisting of "wet woodpulp," was not, by reason of its frozen condition, in such a form as to enable the charterers to load a full and

complete cargo, but was in such a condition that spaces were necessarily left which are called "broken stowage," and that, therefore, the cargo tendered was not, in the condition in which it was tendered, such as to completely fill the ship's holds. It seems to me that, apart from some customary mode of preparing particular goods for shipment at the port of lading, the charterers failed in their obligation to load a full and complete cargo at the port of lading.

I agree that the charterers were under no obligation, by reason of the frost, to tender for shipment chemical wet woodpulp, because a full and complete cargo of such wet woodpulp could have been loaded notwithstanding the frost. They were entitled to tender any cargo of wet woodpulp within the meaning of those words in the charterparty: see *Southampton Steam Colliery Co.* v. *Clarke*. (1) There is no evidence that the mechanical wet woodpulp might not be so packed as to arrive even in the winter alongside the ship in an unfrozen condition, or in such a condition that a full and complete cargo might not be loaded, leaving no broken stowage, and chemical wet woodpulp can clearly be so loaded. Now, it seems to me that under these circumstances the charterer will have failed in his obligation to load a full and complete cargo unless he has established by the evidence that, according to the custom of the port of lading, a full and complete cargo of bundles of mechanical wet woodpulp, frozen hard, constitutes in the winter a full and complete cargo of wet woodpulp, notwithstanding the necessary consequence of broken stowage and a ship's hold only partially filled. He must also satisfy the Court that such a custom is reasonable, and not inconsistent with the terms of the charterparty. The custom may be read into the charterparty so as to enable one to construe its terms, but cannot be used to control the charterparty, or to create an exception from it.

Now, does the evidence make out such a custom, namely, that at the port of lading a full and complete cargo of mechanical wet woodpulp means a cargo of frozen bundles of wet woodpulp, which leaves the ship's hold only partially filled by reason of the broken spaces? The evidence of Stanton

(1) (1868–70) L. R. 4 Ex. 73; 6 Ex. 53.

C. A. 1899

STEAMSHIP ISIS COMPANY v. BAHR & CO.

Vaughan Williams L.J.

Day, although not strictly applicable to Bangor and Bucksport, I will take as a fair example of the evidence as to the custom. He says: "Mechanical woodpulp is shipped wet, in bundles containing 100 pounds, wet weight; these bundles are always composed of a number of folded sheets of pulp (usually about 50 per cent. air dry), tied with a small rope or string and unwrapped. This has always been and is the method of preparing and shipping export pulp. I have shipped large quantities of pulp in winter; it is always shipped in a frozen condition, for as it contains 50 per cent. of water, it freezes during transportation from mill to seaboard, and a vessel loading in winter cannot possibly make as good stowage as one loading in warm weather." The evidence of Cassidy runs thus: "The bundles of wet woodpulp in the cargo of the *Isis* were prepared for shipment in the usual and customary manner for export from this port. The bundles were not in loose or insecure rolls; they were made up of sheets folded, several of these folded sheets making a bundle. All wet woodpulp ever shipped at Bucksport in sailing vessels or steamers has been put in just such bundles, and secured in the same manner. I have never seen wet woodpulp wrapped with paper or any other covering. It is generally packed in unwrapped bundles of uniform weight of about 100 pounds each, tied with heavy string or cord each way around the bundle, and the bundles are thereby properly secured. Imperfect stowage, if any, was caused entirely by the frozen condition of the pulp. The ship would have loaded considerably more had it not been frozen, as frozen pulp retains its full size and displacement at all times, while soft or unfrozen pulp is flexible, and can be stowed in almost any shape desired; soft pulp will also compress very much from its own weight, when piled many bundles one on the top of the other. Frozen pulp will not compress at all."

This proves plainly enough that in the ports of the State of Maine "mechanical wet woodpulp" in uncovered bundles is, according to the custom of those ports, shipped in a frozen condition; but this is not enough to establish the customary meaning in the winter at these ports of the words "full and complete cargo," when used in respect of mechanical wet wood-

pulp; it must be proved not only that it is shipped in a frozen condition, but also that when so shipped it is accepted as a full and complete cargo, without any claim being admitted for "shortage" by reason of the "broken stowage" and unfilled spaces in the ship's hold.

The evidence does not in terms affirm this, and I confess that I have considerable doubt whether, in the case of evidence of this character, namely, evidence of witnesses whom there has been no opportunity to cross-examine, one ought to carry the statement one jot beyond its terms.

The masters of the ships may consistently with this evidence have successfully claimed for shortage in each case, or the charters may have all been at lump freight.

The normal condition of wet woodpulp, as produced at the factory, even in the hard winter, seems on the evidence to be such that there would be no difficulty in loading a full and complete cargo; it is only when the wet woodpulp is in an abnormal condition, which supervenes by reason of frost during transit from the factory to the port of shipment, that the wet woodpulp assumes a condition which prevents the loading of a full and complete cargo. This being so, I do not think the defendants can excuse themselves for not having loaded a full and complete cargo by merely proving that frozen cargoes of wet woodpulp are habitually loaded at the port of shipment in the winter. They should prove that by the custom such cargoes are treated as full and complete cargo, and no shortage charged. No such custom is alleged or proved, and there is no exception in the charterparty. I think, therefore, that the judgment of Bruce J. was right.

As to the other point raised on the counter-claim, I agree with the other members of the Court.

Appeal allowed in part.

Solicitors for plaintiffs: *Rowcliffes & Co., for Hill, Dickinson, Dickinson & Hill, Liverpool.*

Solicitors for defendants: *Wynne, Holme & Wynne, for H. Forshaw & Hawkins, Liverpool.*

A. M.

1899
July 4.

BELTON *v.* BUSBY AND WOODS.

Gaming—Place used for Betting—Bar of Public-house—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *s.* 3.

A bookmaker was in the habit of attending at the bar of a licensed beerhouse daily at certain hours for the purpose of betting with persons resorting thereto, and he carried on there a business of ready-money betting with the knowledge and permission of the licensed occupier of the beerhouse. His hours of attendance at the beerhouse were known to his customers, who came there for the purpose of transacting betting business with him. The beerhouse keeper had no interest in the bets made, and the bookmaker had no interest in or control over the business of the beerhouse or the house itself:—

Held, that the bookmaker "used" the bar of the beerhouse for the purposes prohibited by the Betting Act, 1853.

CASE stated by a metropolitan police magistrate.

The respondent Woods appeared upon five summonses issued at the instance of the appellant, a chief inspector of the metropolitan police, charging that he on February 25 and March 1, 2, 3, and 4, 1899, being a person using the Royal Pair beerhouse, Gloster Grove, Kensington, did use the same for the purpose of betting with persons resorting thereto contrary to s. 3 of the Betting Act, 1853. And the respondent Busby also appeared upon five summonses, issued at the instance of the appellant, charging that he upon the said dates, being the licensee of the Royal Pair beerhouse, did suffer the house to be used by the said Woods in contravention of the Betting Act, 1853, contrary to s. 17, sub-s. 2, of the Licensing Act, 1872.

The following facts were proved or admitted: The respondent Woods is a professional betting man or bookmaker. The respondent Busby was during the times referred to in this case the keeper and proprietor of the Royal Pair beerhouse, a duly licensed house, and was the person licensed in respect thereof. Upon each of the five days named in the summonses Woods came to the Royal Pair shortly after noon, and remained there to shortly before 3 P.M. During the presence of Woods, Busby was always there, and what is described in this case took place with the knowledge and permission of Busby. Woods upon

only one occasion bought any beer at the Royal Pair, and on two occasions he sent out for a bottle of whisky, which was bought off the premises, and was drunk by both Woods and Busby, and except for the purchase of some cigars Woods was not, except as above mentioned, seen to be a customer at the Royal Pair for what was ordinarily sold there. Woods always came to a particular compartment called the "saloon compartment," and generally remained near and on one side or the other of a certain partition which projected for some little distance from the counter out on to the floor. He occasionally went from there to other parts of the saloon, and to the public bar and the tap-room as occasion arose, returning to the neighbourhood of the said partition. Woods conducted in the saloon the business of ready-money betting; he received bets there, generally made at starting prices, by means of slips of paper bearing the name of the horse or dog backed, which were handed to him together with the money staked by the persons making the bet; and he paid money there in respect of bets won to the winners thereof; and discussions and disputes about bets also took place there in the saloon with Woods. Bets occasionally also took place between Woods and Busby, and were settled over the counter in the saloon; and they conversed about bets, horses, and racing. Woods also invited the persons coming to the house to bet with him, sometimes successfully, and sometimes the man invited would make an excuse, such as that he had no money. The evidence led to the inference that Woods was known to his customers to be at the above times at the Royal Pair, and to carry on his betting business there as described, and that persons came there for the purpose of transacting betting business with him. Woods had the permission of Busby for doing what he did as above described. Apart from the betting business carried on by Woods, the ordinary business of a beerhouse was carried on at the Royal Pair. Woods had no interest of any sort in the latter business or in the house itself. He did not take any part in the management of the house, nor had he any control over the business of the house. There was no evidence that Busby had any interest in any of the bets made by Woods.

1899

BELTON v. BUSBY.

The magistrate was of opinion that, having regard to the judgment of the Lord Chancellor in *Powell* v. *Kempton Park Racecourse Co.* (1), the respondent Woods was not using the bars of the beerhouse in such a manner as to constitute an illegal user within the meaning of the Betting Act, 1853, and he dismissed the summonses against him; and as in his opinion it followed as a necessary consequence that the respondent Busby could not be said to have permitted any user by Woods of an illegal character, he accordingly dismissed the summonses against him also.

Danckwerts, for the appellant. The case is covered by the authority of *Hornsby* v. *Raggett* (2) and *McWilliam* v. *Dawson*. (3) In the former case it was held that a beerhouse keeper who knowingly permitted a bookmaker on five different days to use the bar of his house for betting with persons resorting thereto committed an offence against s. 3 of the Betting Act, 1853, although the bookmaker did not occupy any specific place in the room, and had no property in the premises; and in the latter, where the facts were similar, the bookmaker was held to have committed an offence against that section. Those cases are still good law, notwithstanding the decision in *Powell* v. *Kempton Park Racecourse Co.* (1) A. L. Smith L.J., who was a party to the decisions in the two former cases, was also one of the Lords Justices whose judgments in the Court of Appeal in the *Kempton Park Case* (4) were afterwards affirmed by the House of Lords. In the *Kempton Park Case* (4) he expressly distinguished the case before him from such a case as the present. He said (5): "I do not propose to deal with the numerous cases which have arisen about the user of rooms at public-houses by betting men when carrying on their business of betting with persons resorting thereto, for the words 'house' and 'room' are specifically mentioned in the Act as two of the prohibited places, when used by a betting man for the carrying on the business of betting therein, and in my judgment these

(1) [1899] A. C. 143.
(2) [1892] 1 Q. B. 20.
(3) (1891) 56 J. P. 182.
(4) [1897] 2 Q. B. 242.
(5) [1897] 2 Q. B. at p. 279.

cases have no application to betting in an inclosure at a racecourse in the usual way as in the present case." It is true that in the House of Lords Lord Halsbury (1), when dealing with the meaning of the word "use" in the Act, said: "It is not the repeated and designed, as distinguished from the casual or infrequent, use which the employment of that word imports here, but the character of the use as a use by some person having the dominion and control over the place, and conducting the business of a betting establishment with the persons resorting thereto." But all that he meant by that expression was that the person "using" the place must have some higher right to be there than the members of the general public resorting there. Here, as in *Hornsby* v. *Raggett* (2) and *McWilliam* v. *Dawson* (3), the bookmaker Woods had a larger right than the rest of the public: the facts suggest that he had a licence from the beerhouse keeper to carry on his betting business there. It is true he had no dominion and control over the place; but he was the owner and conductor of the business of betting carried on there.

No counsel appeared for the respondents.

GRANTHAM J. I much regret that the respondents were not represented by counsel on this appeal. But at the same time, I cannot entertain any doubt that our judgment must be for the appellant. There is, it seems to me, this great distinction between the racecourse cases, such as *Powell* v. *Kempton Park Racecourse Co.* (4), and the present, that in the former the bookmakers and the members of the public who bet with them go into the racecourse inclosures on exactly the same footing; the place is open to them both on the same terms; the one has no greater right to be there than the other. But that was not the case here. The bookmaker Woods had something in the nature of a right or licence to use the bar of the beerhouse for the purposes of his betting business over and above the right of an ordinary member of the public to resort there. This seems clear from the findings of the magistrate. The case finds that

(1) [1899] A. C. at p. 160.
(2) [1892] 1 Q. B. 20.
(3) (1891) 56 J. P. 182.
(4) [1899] A. C. 143.

1899

BELTON v. BUSBY.

Grantham J.

he was allowed to remain there regularly for certain hours every day, although he was not there as a customer of the beerhouse, and did not order any of the beer which was to be got there; whereas ordinary members of the public would not be allowed to remain there unless they purchased the beer. It may well be that the fact of Woods being known to be there at certain hours attracted to the house and indirectly promoted the consumption of Busby's beer, and this attraction of custom to the house may have been the consideration for Busby granting the licence to Woods to use the house as his betting house. I think that this case was clearly within the mischief aimed at in the Betting Act, 1853; that Woods did within the meaning of that Act use the bar of the beerhouse for the purpose of betting with persons resorting thereto; and that it was just as much a betting house for him, kept by him, as would have been a room of which he had paid the rent. Then, if Woods in so using the room committed an offence against the Act of 1853, it follows that Busby committed an offence against the Licensing Act, 1872, in permitting his premises to be so used.

BRUCE J. I am of the same opinion. I think that the room, the saloon bar, was used by Woods for the purpose of betting with persons resorting thereto. I think that Woods was a person using the room in the sense that he regularly resorted there for the purpose of carrying on the betting business, and was the person in control of that business. Therefore, I entertain no doubt that he was guilty of an offence against the Betting Act; and if he was guilty of an offence against that Act, and what he did was done with the knowledge and consent of Busby, then Busby was guilty of an offence against the Licensing Act.

Judgment for appellant.

Solicitors for appellant: *Wontner & Sons.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1899
July 3.

THE JOINT COMMITTEE OF THE RIVER RIBBLE *v.* HALLIWELL.
THE SAME *v.* SHORROCK.

Nuisance—Pollution of River—"Putrid Solid Matter"—Lawful Exercise of Right to Impound or Divert Water—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *ss.* 2, 17, 20.

Sect. 2 of the Rivers Pollution Prevention Act, 1876, prohibits the putting, or causing or knowingly permitting to be put, or to fall into any stream, so as to pollute its waters, "any putrid solid matter," and by s. 20 of the Act "solid matter" shall not include particles of matter in suspension in water. By s. 17 the Act "shall not apply to or affect the lawful exercise of any rights of impounding or diverting water."

The defendant owned weaving sheds, worked by steam-power, on the bank of a river, and he had, for the purposes of his business, for many years prior to the passing of the Act lawfully exercised the right of diverting water from the river by means of a goit and dealing with the same in the following manner. The water so diverted being full of substances discharged into the stream from paper manufactories, not belonging to the defendant, higher up the stream, it had, before it could be used by the defendant for the purposes of his business, to be impounded in a reservoir and allowed to settle. Whilst it was so impounded, the substances contained therein sank to the bottom, and, after about three days, became putrescent in the form of sludge. The water at the top when thus cleared was taken from the reservoir and used for condensing and boiler purposes. Once a week the reservoir was cleaned by opening the sluice-gates into the river, and allowing the water to flow through the reservoir and out into the stream, carrying with it the sludge deposited in the reservoir. The effluent water as it went into the stream through the sluice-gates contained 97·6 per cent. of water and 2·4 per cent. of solid matter :—

Held, by A. L. Smith L.J. and Rigby L.J. (affirming the decision of Lord Russell of Killowen C.J. and Wills J.), that the solid matter when it entered the stream from the reservoir was "in suspension in water" within the meaning of s. 20 and therefore not "solid matter" within s. 2 of the Act :

Held, also (by A. L. Smith L.J., Rigby L.J., and Vaughan Williams L.J.), that, assuming that what was put into the stream was "solid matter" within the meaning of s. 2, the defendant was protected by s. 17 and therefore not liable to be proceeded against under the Act.

APPEAL from the judgment of a Divisional Court (Lord Russell of Killowen C.J. and Wills J.) dismissing appeals from

C. A. 1899

RIVER RIBBLE JOINT COMMITTEE v. HALLIWELL. THE SAME v. SHORROCK.

the decision in two cases of the judge of the Blackburn County Court. (1)

In each of the actions the plaintiffs alleged that the defendant did, on November 6, 1897, put or cause to be put, or to fall, or be carried into the river Darwen certain putrid solid matter, so as to interfere with the due flow of, and to pollute that river, contrary to the provisions of Part I., s. 2, of the Rivers Pollution Prevention Act, 1876; and the plaintiffs claimed against the defendant in each action an order under s. 10 requiring him to abstain from the commission of any further offence against the Act, and an order requiring him to perform his duty in the premises in manner to be specified in such last-mentioned order, and with such conditions and directions for carrying it into effect as to the Court should seem meet. The plaintiffs were constituted an authority to take proceedings under the Rivers Pollution Prevention Act, 1876, by the Local Government Board's Provisional Orders Confirmation (No. 10) Act, 1891 (54 & 55 Vict. c. lxxi.). The facts which in each case were substantially the same are fully stated in the judgment of the Lord Chief Justice in the Court below, and may be sufficiently gathered for the purposes of this report from the head-note and the judgment of A. L. Smith L.J.

The county court judge held that the defendants respectively had not committed any offence under the Act, because the matter which they had put or caused to be put or carried into the river, though putrid, was not "solid" within the meaning of the Act, and also that the defendants were protected by s. 17 of the Act. The plaintiffs thereupon appealed, but the Divisional Court dismissed the appeal.

Cripps, Q.C., and *F. H. Mellor*, for the plaintiffs. What the defendants did amounted to an offence under s. 2 of the Rivers Pollution Prevention Act, 1876. The period of time which must be looked at, for the purpose of inquiring whether the matter, which they put, or caused to be put, or carried into the river, was solid, is the commencement of the operation by which it was carried into the river. It is immaterial whether

(1) [1899] 1 Q. B. 27.

at the moment when the operation was completed, and it got into the river, it remained solid or not. If this were not so, the provisions of the Act would be rendered to a great extent futile; for it would in many cases be open to a person who wanted to get rid of putrid solid matter by putting it into a stream to dilute it first with water until it ceased to be solid. It cannot make any real difference whether the deposit at the bottom of the reservoir is removed with spades and thrown in a solid state into the river, or whether it is flushed out into the river by turning a stream into the reservoir.

Sect. 17 does not protect the defendants if they have contravened the provisions of s. 2. It was probably inserted ex majori cautela, and only applies to the lawful exercise of any right of impounding or diverting water. The deposit from the impounded water only becomes putrid by reason of chemical change after the water has been for two or three days impounded. Therefore, if the defendants were to flush out their reservoirs more frequently than once a week, no mischief would arise. The 17th section does not authorize them to deal with the water which they may have a right to impound so as to pollute the river. It only reserves to them the right of doing what they had a legal right to do before the Act. It is not shewn that they had any legal right beyond that of diverting and impounding the water in such a way as was reasonably necessary for the purposes of their business.

Joseph Walton, Q.C., and *Danckwerts* (*J. K. Bradbury* with them), for the defendants, were not called upon.

A. L. Smith L.J. The questions in these cases arise under the Rivers Pollution Prevention Act, 1876. In my opinion the judgment of the Divisional Court is correct, and, whether the provisions of s. 2 of the Act or those of s. 17 be looked at, the defendants are entitled to succeed. It appears that the defendants are respectively the owners of mills on the bank of the river Darwen, the proprietors of which from time out of mind before the passing of the Act had been accustomed for the purposes of their mills to divert water from the river up above through a goit, and impound it in a reservoir. It was

C. A. 1899

RIVER RIBBLE JOINT COMMITTEE v. HALLIWELL. THE SAME v. SHORROCK.

A. L. Smith L.J.

necessary so to impound it before using it, because the water as diverted from the river was full of vegetable and other substances, which rendered it unfit for use until it had been allowed to settle. As it settled in the reservoir and the water at the top became clearer, that water was run off and used for the purposes of the mill, and ultimately returned to the river: and no question arises as to it. What water was not so drawn off remained in the reservoir for about a week, during which time a considerable deposit sank to the bottom. It does not appear that the reservoir was ever run quite dry, but on Saturdays, after the machinery had been stopped, the sluice-gates above which open out of the river were pulled up, and the reservoir was flushed with water from the river, and, the gates at the lower end of it being opened, the deposit which had formed was thus washed out into the river. It is not denied that this deposit, which is stated to have become putrid in the reservoir after about three days, had the effect of polluting the river. The question is whether under these circumstances the defendants have respectively committed an offence under s. 2 of the Act. The county court judge has found that the matter which they so turned into the river, though putrid, was not solid, and therefore the defendants have not committed such an offence. By s. 11 of the Act there is an appeal from the county court in cases under the Act, not only on points of law, but also on the merits. On appeal the Divisional Court affirmed the decision of the county court judge, and the plaintiffs thereupon appeal to this Court.

The first question involved depends on the true construction of s. 2 of the Act. That section provides that every person who puts, or causes to be put, or to fall, or knowingly permits to be put, or to fall, or to be carried into any stream, so as to pollute its waters, any (among other things) "putrid solid matter," shall be deemed to have committed an offence against the Act. The question is whether, by flushing out the deposit from the bottom of their reservoirs, as they did, the defendants did within the meaning of the section put, or cause to be put, or to fall, or to be carried into the river, "putrid solid matter." I cannot arrive at the conclusion that they did. It is not an

offence to have putrid solid matter in their reservoirs. The offence is putting into the river "putrid solid matter," which must mean, I think, matter which is solid when it is put into the river. What are the facts as to the matter which the defendants put into the river? I am not sure, as I have said, that on the evidence it was ever solid, but the evidence is clear that, whatever it may have been, at the time when it was put into the river it was 97·6 per cent. water and 2·4 per cent. solid matter. That being so, I ask myself whether any one, according to the ordinary use of language, would call it solid matter when it first got into the river. I cannot bring myself so to call it. I should have arrived at this conclusion without the aid of s. 20 of the Act. That section, in passing which the Legislature seem to me to have had in their mind cases like the present, provides that in the Act, if not inconsistent with the context, "solid matter" shall not include particles of matter in suspension in water. I think the case becomes clearer still when that section is looked at.

I also think that upon the terms of s. 17 of the Act it is clear that the defendants have not committed any offence under s. 2. The case appears to have been dealt with throughout on the footing that the owners of these mills had for the purposes of their works been for years and years before the Act passed impounding the water of the river and dealing with it in the manner which I have described. It was said that they ought to wash out their impounding reservoirs more frequently than once a week. But there does not appear to me to be any evidence of that having been done, or of there being any obligation to do it, prior to the Act. I think that on the evidence it must be taken that what the defendants did, apart from the Act, would have been a lawful exercise of their rights of diverting and impounding the water. That being so, s. 17 provides that the Act shall not apply to it. Therefore, whichever ground is taken, I think the judgment of the Divisional Court was right and this appeal should be dismissed.

RIGBY L.J. I am of the same opinion. With regard to the question arising upon the construction of s. 2 of the Act, there

C. A.
1899
RIVER RIBBLE JOINT COMMITTEE v. HALLIWELL. THE SAME v. SHORROCK.
Rigby L.J.

may be primâ facie some difficulty. But I do not see how a person can be said to put matter into a stream until he gets it to the stream. It may have been solid matter before, but if, when it gets to the stream, it is mixed with water in such a way that the whole may be described as water with solid particles in suspension, then it appears to me that he cannot be said to put solid matter into the stream within the meaning of the Act, and therefore he does not commit the offence created by s. 2.

With regard to the effect of s. 17, I am not disposed to disagree with the view taken by the judges in the Divisional Court and my brother A. L. Smith. The section provides that the Act shall not apply to, or affect the lawful exercise of any rights of impounding or diverting water. In order to apply the section, one must inquire what right (if any) had been lawfully exercised before the passing of the Act. I gather the right exercised by the defendants to have been a right to impound water from the river until the deposit from it became putrid and to let it out into the river in that condition. That being so, it seems to me impossible to say that to insist on the defendants flushing out their reservoirs more frequently than they had been accustomed to do, in order that the matter carried into the river should not be putrid, would not be an interference with the right which they had previously exercised.

VAUGHAN WILLIAMS L.J. I agree. I prefer, however, to rest my judgment on s. 17 of the Act, and the reasoning of my brother A. L. Smith and that of Wills J. in the Divisional Court in relation to that section. I prefer to base my judgment on that section, because I am not quite sure that I entirely agree with all that the Lord Chief Justice said with regard to the construction of s. 2 in the Divisional Court. He said, speaking of the matter the putting of which into the stream constitutes an offence under s. 2 (1): "It must be shewn to be putrid; it must be shewn to be solid; and it must be shewn to be putrid and solid, as I conceive, when it is put into the river; because, if at the time it is put into the river it

(1) [1899] 1 Q. B. 30, 33.

is not putrid solid matter, then in my judgment they do not commit an offence against the Act." Again he said further on: "Without going minutely into the figures as we were invited to do, I find, and for the present purpose am content to take it, that a sample of the effluent, taken by the appellants as it was going into the stream, contained 97·6 per cent. of water and 2·4 per cent. of solid. Now I ask myself can that be said to be solid matter within the meaning of the Act? The Act makes an emphatic difference between solid and liquid matter; and I think that, judged by the common sense and ordinary meaning which people put upon language of this kind, and I see no reason why any other meaning should be put upon it, no person could be found to describe a body of which 97·6 per cent. was water, and the remaining 2·4 per cent. solid, as being solid matter. He would say it was effluent water carrying along with it and in suspense with it 2·4 per cent. of solid matter. If that be so, what was carried was solid matter in suspension and does not come within the provisions of this Act." I am disposed to think that it may be that, if the effluent condition of the matter was brought about simply for the purpose of conveying matter which already had an independent existence as a solid into the stream, the proper moment of time to inquire whether the matter was solid would be the moment of the commencement of the operation of flushing or causing the matter to flow into the stream. The effluent condition may in that case be said to be merely a means to an end, and I should, as at present advised, hesitate to say that, in order to judge whether the matter was solid or not, one ought not to take the time when the operation commenced. I only say this in order to guard myself with regard to that question in case it should arise in the future. I do not say that the state of things to which it is applicable existed here. It may be that there was not in this case such a deposit in the reservoir as to amount to solid matter independent of the supernatant water. I only say that, if that were so, and there were a flushing operation merely for the purpose of sweeping that solid matter into the river, I am not prepared to hold that no offence under s. 2 would have been committed,

C. A. 1899

RIVER RIBBLE JOINT COMMITTEE v. HALLIWELL. THE SAME v. SHORROCK.

because at the moment when the matter came in contact with the stream it had ceased to be solid by means of the flushing operation.

Appeal dismissed.

Solicitors for plaintiffs: *Ridsdale & Son, for F. C. Hulton, Preston.*

Solicitors for defendant Halliwell: *Halliwell & Halliwell, Darwen.*

Solicitors for defendant Shorrock: *Pritchard, Englefield & Co., for C. Costeker, Darwen.*

E. L.

C. A. 1899 *July* 17.

[IN THE COURT OF APPEAL.]

HOLLIDAY *v.* NATIONAL TELEPHONE COMPANY.

Negligence—Independent Contractor—Liability of Employer—Dangerous Work on Highway—Collateral Negligence.

The defendants, a telephone company, were lawfully engaged in laying telephone wires along a street. They passed the wires through tubes which they laid in a trench under the level of the pavement. The defendants contracted with a plumber to connect these tubes at the joints with lead and solder to the satisfaction of the defendants' foreman at the sum of 12*s.* per joint. There was evidence that the work was done by the plumber under the supervision of the defendants' foreman, and that one of their men was assisting him in it. In order to make the connections between the tubes, it was necessary to obtain a flare from a benzoline lamp, which could not be done without the application of heat to the lamp. The lamp used for the purpose was provided with a safety-valve. The plumber, for the purpose of obtaining the necessary flare, dipped the lamp into a caldron of melted solder, which was placed over a fire on the footway for the purpose of the work, and which was unprotected by any screen or tent. Dipping the lamp into the solder would have been a proper and usual mode of obtaining the flare provided the lamp had been in good order. The safety-valve of the lamp not being in working order, as the plumber ought to have known, the lamp exploded, with the result that the plaintiff who was passing on the highway was splashed by the molten solder and thereby injured. In an action by him against the defendants in the City of London Court for damages in respect of the injuries so occasioned to him, the deputy judge held that the plumber was not doing the work as an independent contractor, but under

the defendants' supervision and control, and that the defendants were responsible for his negligence as above mentioned :—

Held (reversing the judgment of a Divisional Court), that the judgment of the deputy judge was right on the grounds, first, that there was evidence that the defendants and the plumber were jointly engaged in the performance of the work under such circumstances as to render the defendants liable for the negligence of which the plumber had been guilty; and, secondly, that, even if the plumber were an independent contractor, the defendants, having authorized the performance upon a highway of work, which from its nature was likely to involve danger to persons using the highway, were bound to take care that those who executed the work for them did not negligently cause injury to such persons.

APPEAL against the judgment of a Divisional Court (Wills and Lawrance JJ.) allowing an appeal from the judgment of the deputy judge of the City of London Court. (1)

The action was to recover damages for personal injuries which had been occasioned to the plaintiff as follows. The defendants were engaged in laying down telephone wires under a street at Clapham called "The Pavement," for which purpose they had taken up the pavement of the street. They had obtained the requisite consent of the local authority, and were acting lawfully in so doing. They had laid down a number of tubes below the level of the footpath, in which they had inserted bundles of telephone wires. The tubes which were socketed, each into the next, were then joined up to one another, and the joints made tight by rings of lead, after which solder was run into the interstice between the cup or socket of one pipe and the end of the pipe fitting into it. The lead or soldering material was melted in an iron pot or caldron, which with the fire underneath it was placed on the footpath unprotected by any screen or tent, and the soldering material was ladled out of this pot and run into the joints. The joints were below the surface of the ground, and it was necessary for the performance of the work to get a flare from a benzoline lamp, though whether for the purpose of getting light or heat did not appear. To get the vapour necessary to give the flare, heat had to be applied to the lamp, and, as heated benzoline vapour is highly elastic, and may be explosive if unduly confined, the lamp had

(1) [1899] 1 Q. B. 221.

C. A. 1899

HOLLIDAY v. NATIONAL TELEPHONE COMPANY.

to be furnished with a safety-valve to prevent undue pressure upon the interior. Upon the particular section of the work upon which the accident to the plaintiff happened the defendants had themselves dug the trench, laid the pipes, threaded the bundles of cables through them, and filled in afterwards, but as a general rule they did nothing themselves but put in the cables and fill in at the places where the joints were made, these places being necessarily left open till the joints had been completed, and the rest of the work was done by independent contractors. To make the joints the defendants employed one George Highmore. The terms of his employment were contained in a document of which the following is a copy. It was upon an ordinary tradesman's memorandum form with a printed heading, and was as follows: "Memorandum. London, Nov. 24, 1896. From G. Highmore, Plumber, Zinc Worker, Hot Water Fitter, and Sanitary Engineer. Workshop 2A Arthur Street, Old Kent Road. Estimates for General Repairs. To." So far all except the date was printed; the rest was written. It continued: "Brown Esq., Telephone Co. Dear Sir. Re Clapham Road. I will agree to connect up 2" lead casings of cable work, 7lb. sheet lead, 2' 4" by 10½" or 11", and connect with wiped joints and seam to the satisfaction of the foreman in charge of work for the sum of 11*s.* per connection. (Signed) G. Highmore." On the same piece of paper lower down was a pencil memorandum initialled by the defendants' manager. "Verbal arrangement later. 12*s.* each, taking in bends, for which it was originally intended to charge extra." On December 5, 1896, the defendants' manager wrote to Highmore: "Dear Sir. Re Lead Cable Jointing. I beg to inform you that your price of 12*s.* per connection, bends included, has been accepted for the connecting with wiped joints and seams the above cable to the satisfaction of the company's representative." It appeared that George Highmore had at least two men in his employment. The course of business was for the defendants to send to him when they wanted connecting to be done, and he came or sent a man, a second generally accompanying, and did the work presumably as soon as he could; but there was no agreement that he should come at any

specified time. At the time of the accident George Highmore had got other work at some gasworks, and he had said to his brother Alfred Highmore, "You can take this job off me"; and accordingly Alfred Highmore came alone to do the jointing. The defendants' local manager visited the work several times a day to see that the joints were properly made, and he stated in evidence that, if the work was not satisfactory, he could put an end to Highmore's contract. At the time when the accident occurred Alfred Highmore was engaged in making the connection between two of the pipes, a man in the service of the defendants being then present. There was a conflict of evidence as to whether this man was assisting Highmore or not. For the purpose of getting a flare from a benzoline lamp as above mentioned, Alfred Highmore dipped the lamp into the molten metal in the caldron. There was evidence that this was one mode, among others, in which the lamp could be and frequently was heated for the purpose of obtaining a flare, and the deputy judge found that it was a proper thing to do, provided the lamp was in good order. The safety-valve of the lamp was out of order and would not work, and it was admitted by the defendants that Highmore ought to have known this, and that it was an act of negligence on his part to use the lamp in its then condition as he did. When the lamp was dipped in the caldron, owing to the safety-valve being out of order the lamp exploded, and the plaintiff who was at that moment passing by was bespattered with molten metal about the face. It appeared that the caldron and soldering metal and the lamp which exploded belonged to the plumber. The deputy judge (in substance) held that the work was practically under the supervision and control of the defendants, and that Highmore, though paid by the piece, was not for the present purpose an independent contractor, but was in the position of a servant of the defendants; and that the defendants, in the performance of works upon a public highway, the execution of which might entail danger to passers-by, were bound to take precautions for the safety of the public, and to see that the work was properly performed. He therefore gave judgment for the plaintiff for 25*l.* agreed damages.

C. A. 1899

HOLLIDAY v. NATIONAL TELEPHONE COMPANY.

The Divisional Court on appeal reversed his decision (1) on the ground that Highmore was an independent contractor, and that the accident was caused by a casual act of negligence on the part of the contractor's servant collateral to the execution of the work.

Bowen Rowlands, Q.C., and *H. C. Davenport*, for the plaintiff. It is submitted that upon the evidence the deputy judge was entitled to find, as he has found, that Highmore was not an independent contractor, but was in the position of a servant of the defendants for the purpose of making them responsible for his negligence. The Divisional Court had no jurisdiction to set aside the finding of the judge on a question of fact, if there was any evidence to support it. There was evidence that Highmore did the work under the supervision and control of the defendants, and was assisted by their servant. It was to some extent a joint operation in which Highmore acted under the defendants' supervision. The fact that Highmore was paid by the piece, and not by time, does not shew that he was an independent contractor. The case of *Reedie* v. *London and North Western Ry. Co.* (2), which was relied upon by the defendants, was very different from the present. In that case the persons executing the work were undoubtedly wholly independent contractors in a large way of business, who were performing the work independently and on their own responsibility, and the work in itself, and apart from collateral acts of negligence, was not dangerous.

Assuming that Highmore was an independent contractor, under the circumstances the defendants are responsible for his negligence. A body in the position of the defendants, who are authorized for their own purposes to interfere with a public highway, and execute thereon or near thereto works which, in the absence of precaution, may entail risk to those who are lawfully using the highway, cannot by employing an independent contractor delegate their own responsibility: *Hardaker* v. *Idle District Council* (3); *Penny* v. *Wimbledon Urban*

(1) [1899] 1 Q. B. 221. (2) (1849) 4 Ex. 244.
(3) [1896] 1 Q. B. 335.

Council (1); *Hughes* v. *Percival* (2); *Black* v. *Christchurch Finance Co.* (3) The negligence which occasioned the plaintiff's injuries in the present case was not casual and collateral negligence. There was evidence, and the deputy judge found, that the usual and proper mode of obtaining a flare, which was necessary for the work, was by dipping the lamp into the caldron of molten metal. The proper course would have been to protect the caldron with some kind of tent or screen so as to avoid any risk of accidents of this kind to persons passing along the highway.

Mattinson, *Q.C.*, and *Lawless*, for the defendants. There is no evidence to justify the suggestion that Highmore was a servant of the defendants, or that they were performing the work of making the connection jointly with him. There was no evidence that the defendants controlled the execution of the work done by Highmore in such a way as to make him their servant. The facts that Highmore could not wholly choose his own time for doing the work, and that the work had to be done to the satisfaction of the defendants' foreman do not make him their servant. The latter term is common to contracts for the execution of work by contractors. The defendants' manager no doubt supervised the work in the sense that he examined it to see whether it was satisfactory before the trench was filled in; but such supervision often takes place in the case of undoubtedly independent contractors, and there is no evidence that the defendants gave directions as to the mode of performing the work. Highmore was not paid wages, but so much for each joint. He brought his own assistants, and found his own materials and tools, and performed the work as he thought fit, subject to the result being satisfactory to the defendants' foreman.

Secondly, there was nothing dangerous to the public in the work that Highmore was employed to do. The mischief arose from negligence on his part which was casual and collateral to that work. It was no doubt incidental to the operation going on that the lamp should be heated in order to obtain a

(1) [1898] 2 Q. B. 212; ante, p. 72. (2) (1883) 8 App. Cas. 443.
(3) [1894] A. C. 48.

C. A. 1899

HOLLIDAY v. NATIONAL TELEPHONE COMPANY.

flare, but he was not employed to put the benzoline lamp into the molten metal, much less to do so when the safety-valve was defective. There were other modes of obtaining the necessary flare, which would not have involved the risk of scattering the molten metal about. Assuming that there is a certain amount of risk involved in having a caldron of molten metal on the highway, as, for instance, that it may get upset, the accident in this case was not the natural consequence of having it there: it arose from an independent act of casual and collateral negligence by the contractor's servant. The particular danger which arose was not incidental to the work which was ordered by the defendants. [He cited *Hole* v. *Sittingbourne and Sheerness Ry. Co.* (1)]

Bowen Rowlands, Q.C., was not called upon to reply.

EARL OF HALSBURY L.C. In my opinion the judgment of the Divisional Court was erroneous, and that of the deputy judge was right. It appears to me that, upon the evidence given, there are two definite and distinct grounds upon which the judgment of the deputy judge may be supported. There was clearly evidence to the effect that the work, in the course of which the accident happened, was being done, not by the person whom the defendants call an independent contractor alone, but by that person and the defendants jointly; and I think the evidence justified the view that they were both engaged in the joint operation under such circumstances that both of them would be responsible if there were negligence in the performance of it such as that which occasioned the accident in this case. There is a further ground for holding that the plaintiff is entitled to succeed. There was here an interference with a public highway, which would have been unlawful but for the fact that it was authorized by the proper authority. The telephone company so authorized to interfere with a public highway are, in my opinion, bound, whether they do the work themselves or by a contractor, to take care that the public lawfully using the highway are protected against any act of negligence by a person acting for them in

(1) (1861) 6 H. & N. 488.

the execution of the works. In this case the work to be done was the soldering together of pipes, and for that operation it appears to have been necessary to have molten metal at hand for the purpose of being instantly applied, and it was, as the deputy judge finds, a common and proper practice, with which it may be assumed that the defendants were familiar as they themselves did part of the work, to dip a benzoline lamp into the caldron of molten metal for the purpose of getting a flare. If the lamp were in good order, the operation would be harmless; but, if the safety-valve of the lamp were out of order, an explosion must ensue. Therefore, works were being executed in proximity to a highway, in which in the ordinary course of things an explosion might take place. It appears to me that the telephone company, by whose authority alone these works were done, were, whether the works were done by the company's servants or by a contractor, under an obligation to the public to take care that persons passing along the highway were not injured by the negligent performance of the work. For these reasons the appeal must be allowed.

A. L. SMITH L.J. I also think that the learned deputy judge was right on both the grounds mentioned by the Lord Chancellor. With regard to the first ground, the finding of the deputy judge to the effect that the plumber was not an independent contractor, but that he acted under the supervision of the defendants who retained the control of the work is, in my opinion, fatal to the defendants.

With regard to the second ground, the case stands thus. The defendants were a telephone company who were engaged in the execution on a highway of works which were clearly dangerous. It obviously involves a certain amount of danger to have a caldron of molten lead on a highway. The defendants, therefore, on the hypothesis that Highmore was an independent contractor, were delegating to him the execution of dangerous work upon a highway. The deputy judge finds that in making the joints between the pipes it was a proper thing for the purpose of getting the necessary flare to dip the benzoline lamp into the molten metal. The safety-valve of

C. A.
1899

HOLLIDAY
v.
NATIONAL
TELEPHONE
COMPANY.

A. L. Smith L.J.

the lamp being out of order, the result of doing that was that the lamp exploded, and the molten lead was scattered about, some falling on the plaintiff who was passing by upon the highway. The defence is that the defendants are not liable in respect of the injury sustained by the plaintiff, because it was occasioned by the negligence of an independent contractor for whom they are not responsible. In my opinion, since the decision of the House of Lords in *Hughes* v. *Percival* (1) and that of the Privy Council in *Black* v. *Christchurch Finance Co.* (2), it is very difficult for a person who is engaged in the execution of dangerous works near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway. I do not agree that this was a case of mere casual and collateral negligence within the meaning of that term, for it was negligence in the very act which Highmore was engaged to perform.

VAUGHAN WILLIAMS L.J. concurred.

Appeal allowed.

Solicitors for plaintiff: *Gibbs, White & Strong.*
Solicitor for defendants: *E. L. Gaine.*

(1) 8 App. Cas. 443. (2) [1894] A. C. 48.

E. L.

HOGARTH *v.* WALKER.

1899
July 5.

Insurance (Marine)—Policy on Ship—What included under term "Furniture."

Where a ship is employed in the grain trade, and consequently requires to be furnished with separation cloths and dunnage mats for the proper carriage of her cargo under the ordinary circumstances of that trade, a time policy on the ship and its furniture will cover the cloths and mats, although on the particular voyage on which the loss occurs they are temporarily, owing to the special nature of the voyage, not in use, but stowed away in the forepeak.

TRIAL before Bigham J. without a jury.

The action was on a policy of marine insurance on a ship and its furniture. The policy, which was in the form of an ordinary Lloyd's policy, was a time policy on the plaintiff's ship *Felbridge* for twelve months. The *Felbridge* was continuously employed in the grain trade. It is the recognised custom of that trade for the ships employed in it to carry separation cloths and dunnage mats. The separation cloths are used for the purpose of dividing the different parcels of grain, and the dunnage mats are used mainly for the purpose of keeping the grain off the ship's floor. The *Felbridge* was generally engaged in carrying grain from the Black Sea; and as in that trade the grain is shipped in many different parcels, the use of separation cloths is absolutely necessary. On the other hand, in a cargo of grain from America there is never more than one parcel; therefore in that trade separation cloths are not necessary. Nor is it the practice in the American trade to use dunnage mats, wooden battens being used for dunnage purposes instead. During the currency of the above-mentioned policy the *Felbridge*, being bound homewards from an American port with a cargo of grain, and having her separation cloths and dunnage mats stowed away in the forepeak, came into collision with a pier-head stem on, with the result that the stem was considerably damaged and a large quantity of the cloths and mats were washed out of the forepeak and lost. The underwriters defended the action on the ground that the separation cloths and dunnage mats were not covered by the policy.

1899

HOGARTH v. WALKER.

Isaacs, Q.C., and *Montague Lush*, for the plaintiffs. The cloths and mats were part of the ship's "furniture." As a grain ship she would be unseaworthy without them for the purposes of the Black Sea trade, in which she was ordinarily engaged at the time the policy was underwritten. It is true that they were not a necessary part of the furniture for the purposes of the particular voyage on which the loss occurred, but the policy was a time policy and not a voyage policy. In *Hoskins* v. *Pickersgill* (1) it was held that an insurance upon a ship employed in the Greenland trade on "ship tackle apparel and furniture" did not cover the fishing tackle. But that case turned on the finding of the jury that the usage of that trade was to insure the fishing tackle separately. It is not suggested that there is any such usage here.

Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendants. A shipowner carries on two businesses—that of the owner of a ship, and that of a carrier of cargo. The cloths and mats belong to the plant of the latter business rather than of the former—they are part of the equipment of the cargo, not of the ship. Grain is frequently carried in bags, and in that case the bags perform the same office that the separation cloths do where the grain is carried in bulk. But it is often provided in grain charters that the charterer shall supply the bags, and as in that case the bags could not be treated as part of the furniture of the ship, neither could they be so treated where they are supplied by the shipowner. The true principle is that the outfit insurable under the head of ship and furniture is limited to that which is necessary to make her seaworthy for the voyage insured, to the exclusion of any further portion which may be supplied to fit her for a particular trade, and relates to the cargo rather than to the ship. A permanent grain ceiling is part of the outfit, but not movable things such as these cloths and mats.

BIGHAM J. In my opinion the plaintiffs are entitled to succeed. The question is whether an ordinary Lloyd's time policy on ship, the ship being engaged in the grain trade,

(1) (1783) 3 Doug. 222.

1899

HOGARTH v. WALKER.

Bigham J.

covers separation cloths and dunnage mats. It seems clear that under the ordinary circumstances of that trade the use of such cloths and mats would be necessary for the proper carriage of the cargo, and that if the ship went to sea without them she would be unseaworthy. Therefore they must be regarded as forming part of her furniture. I can see no distinction between them and movable bulkheads, which it was admitted by the defendants would form part of the ship's furniture. Both are intended for the same purpose—namely, to separate one part of the cargo from another.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Botterell & Roche, for Vaughan & Roche, Cardiff.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

J. F. C.

ANGLO-ARGENTINE LIVE STOCK AND PRODUCE AGENCY *v.* TEMPERLEY SHIPPING COMPANY.

1899

July 5, 7.

Ship—General Average—Depreciation of Cargo—Remoteness.

The plaintiffs shipped a deck cargo of cattle and sheep on board the defendants' ship for carriage from Buenos Ayres to Deptford under a contract which provided that the ship should on no account call at a Brazilian port before landing her live stock. The reason for this provision was that by an Order of the Board of Agriculture foreign animals could not be landed in the United Kingdom if the ship conveying them had touched at a Brazilian port in the course of her voyage. During the voyage the ship sprung a leak, and the master, for the safety of all concerned, put into a Brazilian port for repairs. The plaintiffs thereby suffered loss in consequence of the live stock being unable to be landed in the United Kingdom, and having to be sold elsewhere at lower prices than would have been realized in the English market. The master at the time when he resolved to put into the Brazilian port knew that this would be the result of his so doing:—

Held, that the depreciation of the live stock was a loss which the plaintiffs were entitled to have made good in general average.

TRIAL before Bigham J. without a jury upon an admitted statement of facts.

1899

ANGLO-ARGENTINE LIVE STOCK AND PRODUCE AGENCY v. TEMPERLEY SHIPPING COMPANY.

By a charterparty dated February 4, 1898, the defendants, the owners of the *Edenbridge*, chartered her to Williams & Co., of Buenos Ayres, for a voyage from the River Plate to Deptford, and a further port in the United Kingdom or Continent within certain limits. The charter contained the words, "Charterers to provide a full deck cargo of live stock for Deptford, in accordance with Argentine Government Regulations," and "Average, if any, payable according to York-Antwerp Rules, 1890."

By a live stock charterparty dated March 26, 1898, the defendants agreed with the plaintiffs that she should load from the plaintiffs a full deck cargo of cattle and sheep for Deptford. This agreement contained the words, "Steamer on no account to call at Brazilian or Continental ports before landing her live stock." By the Foreign Animals Order of 1896, made by the Board of Agriculture in exercise of their powers under the Diseases of Animals Acts, 1894 and 1896, foreign animals cannot be landed in the United Kingdom if the steamer conveying them has touched at Brazilian or Continental ports on her voyage.

The plaintiffs loaded on board the *Edenbridge* 201 bullocks and 862 sheep at Buenos Ayres, and the captain of the *Edenbridge* signed a bill of lading for such live stock dated April 15, 1898. This bill of lading contained the words, "Average, if any, to be adjusted according to the York-Antwerp Rules of 1890," and "Neither the steamer nor her cargo nor the owners thereof are to be liable under any circumstances for contribution in average for jettison of animals."

On April 15 the vessel finished loading at Buenos Ayres, and proceeded down the channel. On April 16 a rivet blew out of the port boiler, rendering the boiler useless, and the master for the safety of all concerned determined to put into Monte Video for repairs, and proceeded there under one boiler, and arrived there at 2.30 P.M. On April 18 the necessary repairs having been effected, the vessel left Monte Video. On April 20 the weather increased in violence, blowing a gale, and on April 26, on sounding the well of No. 1 hold fifteen feet of water was found in the hold. The pumps were set to work, but were

unable to keep the water down. As it was impossible to ascertain at sea the exact position or extent of the leak, or to repair it when ascertained, it being obviously below the water-line, the captain determined to put into Bahia, where she arrived on April 27.

At Bahia expenses were incurred for extra fodder and water and otherwise in connection with the live stock while the vessel was in port. Owing to the vessel having put into Bahia, a Brazilian port, the animals by reason of the Order aforesaid could not be landed alive in the United Kingdom. It was therefore arranged, and was the best course to take in the interests of all concerned, that the vessel should proceed direct to Antwerp and deliver them at that port. The vessel left Bahia on May 12, and arrived at Antwerp on June 7. The live stock realized at Antwerp lower prices than they would have realized if they had been landed alive at Deptford. The difference in the two sets of prices amounted to 1961*l.* 16*s.* 3*d.* The plaintiffs also incurred expense in respect of extra wages and maintenance of their cattlemen in charge of the live stock during two days' detention at Monte Video and fifteen days at Bahia to the amount of 27*l.* 12*s.* 6*d.*; and the expense of supplying fodder and water to the animals at Bahia amounted to 436*l.* 0*s.* 9*d.* The plaintiffs claimed a declaration that they were entitled to have the said three amounts made good in general average by the defendants and the other parties interested.

Carver, Q.C., and *Scrutton*, for the plaintiffs. The amount of the depreciation of the live stock is recoverable in general average, for that portion of their value was totally lost as soon as it was decided to put into Bahia. It was at that time known to all the parties interested, including the other shippers of cargo, that this loss to the plaintiffs would happen. For the captain knew it, and as he was acting for all the other shippers of cargo in putting into the port, his knowledge bound them. The wages and maintenance of the cattlemen is also the subject of general average. By the terms of the bill of lading average was to be adjusted according to the York-Antwerp Rules, 1890,

1899

ANGLO-ARGENTINE LIVE STOCK AND PRODUCE AGENCY v. TEMPERLEY SHIPPING COMPANY.

and by Rule XI., "When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs, mentioned in Rule X., the wages payable to the master, officers, and crew, together with the cost of the maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average." The cattlemen were part of the crew. They were employed in work upon the ship—and must be treated as seamen. By s. 742 of the Merchant Shipping Act, 1894, "'Seaman' includes every person (except masters, pilots and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship." It was absolutely necessary that persons should be on board the ship to feed and water the cattle, otherwise they could never reach their destination alive. The fact that the cattlemen were paid by the charterers ought not to make any difference. The plaintiffs are also entitled to contribution to the cost of fodder and water supplied to the cattle at Bahia under Rule X. (*c*) of the York-Antwerp Rules, which provides that, "Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted." The term "storage charges" would include the supply of fodder and water. But apart from those rules the cost of keeping the animals alive in the port of refuge is to be treated as a general average loss at common law.

Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendants. The depreciation of the cattle by putting into Bahia is not recoverable in general average. Only those losses are to be contributed to which were contemplated by the parties at the time of loading on board ship as likely to result from a general average act. This is not the kind of loss that would be contemplated at the time of loading. It is too remote. Suppose a ship were compelled for the common safety to seek a port of refuge in the Levant, and by reason of plague regulations known to the master at the time of entering the port she was

prevented from prosecuting her voyage, the loss of freight could not be brought within general average. Again, suppose that at the time of putting into a port of refuge for repairs the master knows that by reason of the delay at the port he will lose a charterparty that is waiting for him at his port of discharge, that loss would be too remote to be treated as a general average loss. Nor are the wages and maintenance of the cattlemen general average expenses. The cattlemen are not part of the crew within Rule XI. The case is like that of a railway company carrying a horse and groom at a fixed charge. Nor does Rule X. apply to the cost of feeding and watering the cattle at Bahia. Nor do either of these expenses come within general average at common law. Losses which arise from a mere prolongation of the voyage, such as depreciation of a perishable cargo of fruit, or missing a market when it is known that it will be missed as the result of putting into the port of refuge, or loss of interest on money employed, have never been included in general average, even where the necessity of putting into the port of refuge was the result of a general average act. There is no case in which such a claim has ever been allowed at common law.

Carver, Q.C., in reply. The time at which the losses contemplated by the parties as the reasonable consequence of a general average act are to be ascertained is the time, not of loading on board ship, but of doing the average act itself. Further, the loss by depreciation of the cattle was not merely the reasonable and natural result of the average act, it was the immediate result. As to the other expenses, it is incorrect to say that loss by mere delay in port is never made good in general average. In *Atwood* v. *Sellar* (1) there is a dictum that wages and provisions of crews may be allowed at common law where the ship puts in to repair as the result of a general average act.

Cur. adv. vult.

July 7. BIGHAM J. Shortly stated, the facts of this case are as follows:—The plaintiffs in April, 1898, shipped on board

(1) (1880) 5 Q. B. D. 286, at p. 291.

1899

ANGLO-ARGENTINE LIVE STOCK AND PRODUCE AGENCY v. TEMPERLEY SHIPPING COMPANY.

Bigham J.

the defendants' steamer *Edenbridge* at Buenos Ayres a deck cargo of sheep and cattle for carriage to Deptford. The contract of carriage stipulated (1.) that the steamer should on no account call at any Brazilian or Continental ports before landing her live stock, and (2.) that average (if any) should be adjusted according to the York-Antwerp Rules. The reason for the insertion of the first of these stipulations was that by an Order made under the provisions of the Diseases of Animals Acts, 1894 and 1896, foreign animals cannot be landed in the United Kingdom if the steamer conveying them has touched at Brazilian or Continental ports on her voyage. The loading of the vessel finished on April 15, and on that day she left Buenos Ayres. On April 20 it was discovered that the vessel was making water from a leak below the water-line, and for the safety of all concerned the captain put into Bahia, arriving there on April 27. The putting into Bahia was a general average act. Bahia being a Brazilian port, the ultimate landing of the cattle at Deptford was by this general average act rendered impossible, and the plaintiffs having thus lost their English market acted for the best by making arrangements for the carriage of their cattle to Antwerp. The cattle were accordingly carried to Antwerp, where they were sold at a much less price than they would have realized if they had been carried to and delivered at Deptford. The repairs to the vessel were done at Bahia between April 27 and May 12. On May 12 she sailed for Antwerp and arrived there on June 7. The plaintiffs incurred a large loss by reason of their cattle having been rendered incapable of being landed at Deptford. They were also put to the expense of maintaining their cattlemen and of providing fodder and water for the cattle while at Bahia. The questions are whether any, and, if so, which of these losses form the subject of general average contribution. The facts will be found set out more fully in a joint statement which was produced at the hearing of the arguments.

As to the damage sustained by putting into Bahia, I think it is recoverable in general average. It is the direct and immediate consequence of the general average act. The moment the vessel touched the Brazilian port the plaintiffs'

property was ipso facto rendered of less value than it was before, because by that act the plaintiffs were deprived of one of their means, and that the best, of realizing their property. It was said by the defendants that a claim such as this was not recoverable in general average because the shipowner and the other cargo owners could not at the time the voyage began have contemplated such a claim arising; and the captain was called before me to say that, though he knew that it was of importance to the plaintiffs that he should not touch at a Brazilian port, he did not know what the precise consequences of touching might be. If it be material to inquire what the captain knew or thought, I am satisfied that he knew well enough that the effect of putting into Bahia would be to render the discharge of the cattle at Deptford impossible, and that this would cause serious loss to the plaintiffs. As to the other cargo owners, I daresay it is the fact that many of them were unaware even that cattle were being carried, and therefore unaware that they were running the risk of having to contribute to such a loss as that which they are now asked to make good. But it would be a dangerous thing to make the liability to contribute depend upon what each cargo owner may be supposed to have contemplated at the beginning of the voyage with reference to the character or incidents of the cargo of the other cargo owners. The captain when he determines on the general average act is the agent of all parties interested; the occasion makes him their agent; and if in doing the act he causes direct injury to the property of any one of them, it must be taken that the others there and then promise to contribute to make it good. If one ought to consider what was in the contemplation of anyone, it ought to be what was in the contemplation of the master at the time he determined upon the sacrifice. Mr. Lowndes, in his work on General Average, 4th ed. p. 36, says: "We have to determine quod pro omnibus datum est, and since giving must always imply an intention to give, what we have here to ascertain must be what loss at once has in fact occurred, and likewise must be regarded as the natural and reasonable result of the act of sacrifice? or, in other words, what the shipmaster would naturally or might

1899

ANGLO-ARGENTINE LIVE STOCK AND PRODUCE AGENCY v. TEMPERLEY SHIPPING COMPANY.

Bigham J.

reasonably have intended to give for all when he resolved upon the act? If then upon the act of sacrifice any loss ensues, which the master did not in fact bring before his mind at the time of making the sacrifice, it would have to be considered whether it were such a loss as he naturally might or reasonably ought to have taken account of." Ulrich, in his Grosse-Haverei, p. 5, says: "General average comprises not only the damage purposely done to ship and cargo, but also (1.) all damage or expense which was to be foreseen as the natural (immediate) consequence of the first sacrifice, since this unmistakably forms part of that which was given for the common safety; (2.) all damage or expense which, though not to be foreseen, stands to the sacrifice in the relation of effect to cause, or in other words was its necessary consequence. Not so, however, those losses or expenses which, though they would not have occurred but for the sacrifice, yet likewise would not have occurred but for some subsequent accident." These two passages seem to me to express accurately the principles upon which the damages to be made good in general average are to be ascertained; and applying those principles to the present case, I think that as, when the master of the *Edenbridge* resolved upon the average act, he knew, or ought to have known, that he was sacrificing the advantages which the plaintiffs then possessed by reason of the ship not having touched a Brazilian port, he must be taken to have intended that the value of those advantages should be made good in general average; and the master's intention is the intention of the parties interested, whose agent he is. I am further of opinion that the damage in question is the necessary consequence of the general average act.

Then it was said that this was like a claim for damages for wages of crew and detention of a ship while in a port of refuge, and it was pointed out that such damages are never recoverable in general average where (as here) the vessel puts into port to repair damage which is not itself caused by a general average act: *Atwood* v. *Sellar*. (1) But there is a distinction between such a case and the one in hand. In the case supposed the

(1) 5 Q. B. D. 286.

shipowner has contracted with all the other co-adventurers to keep his vessel tight, staunch, and strong to the end of the voyage, and if by storm or by any other similar misfortunes (not voluntary) she is damaged, and then for the benefit of all concerned the master has to seek a port of refuge, he must when he gets there repair the damage and so perform his contract; and he must do it at his own expense, part of which will consist of the wages of his crew during the necessary delay, and the damages arising from the detention of the ship. In the case before the Court the plaintiffs were under no contractual obligation to bear the loss which they now seek to recover.

It was further contended that the case was like the case of loss of market for which damages could not be recovered: *The Notting Hill.* (1) But it is not like such a case. Damages resulting from loss of market arise by reason of fluctuations in price which happen, not in consequence of the act complained of, but by reason of events which are independent of the act. Here, the instant the ship touched Bahia, and by that fact of itself, the goods became of much less value than that which they otherwise would have had. The goods did not arrive too late for the English market, but by the average act they were prevented from ever arriving at all. For these reasons I am of opinion that the plaintiffs are entitled to succeed in respect of the main part of their claim.

Then as to the keep of the cattlemen and the cost of the fodder and water. The cattlemen were the servants of the plaintiffs, the cargo-owners, and were paid by them. The defendants, the shipowners, gave them a free passage on the vessel, but otherwise they gave them nothing. Their duty was to attend to the wants of the cattle; they had nothing to do with the navigation of the ship. Mr. Carver contended that Rule XI. of the York-Antwerp Rules gave the plaintiffs the right to have the cost of maintaining the men during the ship's detention at Bahia made good in general average. The rule is as follows: "When a ship shall have entered or been detained in any port or place under the circumstances,

(1) (1884) 9 P. D. 105.

1899

ANGLO-ARGENTINE LIVE STOCK AND PRODUCE AGENCY v. TEMPERLEY SHIPPING COMPANY.

Bigham J.

or for the purposes of the repairs, mentioned in Rule x., the wages payable to the master, officers, and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average." Mr. Carver said that inasmuch as the cattlemen worked on the ship they ought to be regarded as part of the "crew." In my opinion they were not part of the crew at all; they were not under the command of the master; they were not in the service of the shipowners; they did not sign the ship's articles; nor were they in any way engaged in the navigation of the vessel. As to the cost of fodder and water for the cattle during the same period, it was said that it was recoverable under Rule x. (*c*), which is as follows: "Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted." It was said that the cost of fodder and water ought to be covered by the words "all storage charges on such cargo." But the cattle never were discharged at all at Bahia, so that in my opinion the rule does not apply; and even if they had been discharged I should have great difficulty in saying that the cost of fodder and water could be properly called storage charges. Storage charges comprise the cost of putting into store and the rent of the place hired. They do not include expenditure on the goods themselves.

But it was said that though these two claims may not be recoverable under the York-Antwerp Rules, they are nevertheless recoverable at common law. I am, however, of opinion that they are not. Everyone concerned in the adventure suffers damage by the delay at the port of refuge. Each cargo-owner is delayed in the use or the sale of his goods. The freight-owner is delayed in getting payment of his freight, and the shipowner is deprived of the use of his ship. Yet none of these cases afford the foundation of any claim in general average according to our common law. Perhaps it is desirable that they should; and when the York-Antwerp Rules

are by contract made applicable, some of them do form the subject of contribution. But the common law is clear, and it will be found laid down in the cases collected by Mr. Lowndes and referred to in s. 57 of his work. The loss which each owner sustains may be out of proportion to the loss which the others have to bear. There may be accidental circumstances making the loss in one case more serious proportionally than it is in others. But this fact gives rise to no claim. I see no ground for distinguishing the present case from those to which I have referred. The delay threw upon the plaintiffs the burthen of keeping their cargo in good condition during fifteen days longer than they would otherwise have had to do, and the burthen involved them in the expense of maintaining their cattlemen and supplying the cattle with fodder and water. These damages are exactly of the same character as those suffered in the cases I have instanced, and therefore are, in my opinion, equally irrecoverable. If Mr. Carver could have persuaded me that they came within the meaning of the York-Antwerp Rules he would have succeeded on this part of the claim; but he has failed to do that, and I am satisfied that the common law on which he fell back will not support him. Therefore I direct that the charges for the maintenance of the cattlemen and for the fodder and water should not be treated as subjects of general average.

Judgment accordingly.

Solicitors for plaintiffs: *Parker, Garrett & Holman.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

J. F. C.

C. A.

1899

June 21, 22, 23; *July* 13.

[IN THE COURT OF APPEAL.]

JOHN GRIFFITHS CYCLE CORPORATION, LIMITED, *v.* HUMBER & CO., LIMITED.

Contract—Memorandum in Writing—Signature by Agent "thereunto lawfully authorized"—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

A letter written by an agent within the scope of his authority, which refers to and recognises an unsigned document as containing the terms of a contract made by his principal, is a sufficient memorandum of the contract within the 4th section of the Statute of Frauds, and it is not necessary, in order to satisfy the statute, that the principal should have authorized the agent to sign the letter as a record of the contract.

Smith v. *Webster*, (1876) 3 Ch. D. 49, discussed.

APPEAL from the judgment of Phillimore J. at the trial before him without a jury.

The action was for breach of an agreement as after mentioned.

The defendants were a company engaged in the manufacture and sale of cycles, and had for the latter purpose contracts with various persons in different places. According to the general usage of this trade, these persons were styled in the contracts agents for sale, but they were really purchasers of the defendants' cycles, to whom they agreed to allow large discounts upon their list prices. The plaintiffs were an Irish company, which succeeded to the business of a former company of the same name, with which the defendants had such a contract for the sale of cycles as before mentioned, and which had been wound up.

By a memorandum of agreement made February 13, 1896, under the seal of the defendants, between the defendants and Samuel Greer, the liquidator of the former John Griffiths Cycle Corporation, it was agreed that, in consideration of the said Samuel Greer undertaking to obtain the execution of the agreement set out in the schedule thereto by the John Griffiths Cycle Corporation, a company about to be registered, the

defendants on their part agreed to execute the same when requested to do so. A form of agreement was set out in the schedule which purported to be made between the defendants and the John Griffiths Cycle Corporation, Limited, and by which (so far as material) it was agreed that the defendants should, and thereby did, appoint the said John Griffiths Cycle Corporation sole agents for the sale of their cycles in certain districts for the term of three years from November 1, 1895, that the said John Griffiths Cycle Corporation should pay for the goods supplied by the defendants, and the defendants should supply cycles and goods to the said John Griffiths Cycle Corporation at certain discounts (these being stated to be the maximum ordinary discounts allowed by the defendants to any of their agents), and that, if the defendants should at any time during the continuance of the agreement increase the said ordinary rate of discount to any agents of theirs, then the rate of discount to be allowed by the defendants to the said John Griffiths Cycle Corporation in pursuance of the said agreement should be proportionately increased to the maximum rate of discount so allowed. The plaintiff company was registered on February 20, 1896, for the purpose of, amongst other things, carrying out the agreement of February 13, 1896. The plaintiffs alleged an agreement between the plaintiffs and defendants as set out in the schedule to the memorandum of February 13, 1896, and that the defendants had broken the agreement by forming a company to act as their agents in places for which they had appointed the plaintiffs sole agents, and by allowing to other agents discounts in excess of their ordinary discounts and of the discounts allowed to the plaintiffs, and they claimed damages and an account of the discounts so allowed by the defendants in excess of those allowed to the plaintiffs. The defendants set up by way of defence, among other things, that there was no memorandum or note of the alleged agreement in writing sufficient to satisfy the provisions of the Statute of Frauds. The agreement set out in the schedule to the memorandum of agreement of February 13, 1896, was never executed either by the plaintiffs or by the defendants. It appeared, however, that the defendants had supplied the

C. A. 1899

JOHN GRIFFITHS CYCLE CORPORATION, LIMITED v. HUMBER & CO., LIMITED.

plaintiffs with goods, and the plaintiffs had received and paid for the same in pursuance of the terms of that agreement, and letters had been written by the manager and other officers of the defendants to the plaintiffs with regard to such supply of goods, which letters were held by the Court to refer to and recognise an agreement in the terms contained in the schedule to the memorandum of February 13, 1896, sufficiently for the purposes of the Statute of Frauds. As will be seen from the judgment, the Court were of opinion that the writing of these letters was within the scope of the authority given to officers of the defendant company who wrote them. The learned judge gave judgment for the defendants. (1)

Moulton, Q.C., and *T. Willes Chitty* (*Joseph Walton*, Q.C., with them), for the plaintiffs. The letters signed by the defendants' officers which were in evidence clearly refer to and recognise the existence of an agreement as set out in the schedule to the memorandum of February 13, 1896, and consequently there is a sufficient memorandum of the terms of the contract to satisfy the 4th section of the Statute of Frauds. It is not necessary that the writing signed should be intended to be a record of a contract, or that the agent should be authorized to sign it as a contract: *Jones* v. *Victoria Dock Co.* (2)

Bray, Q.C., and *W. F. Hamilton*, for the defendants. The letters referred to do not constitute a sufficient memorandum of the agreement. By the terms of the statute the memorandum, if not signed by the party to be charged, must be signed by his agent thereunto lawfully authorized. It was held in *Smith* v. *Webster* (3) that, in order to satisfy the statute, the note or memorandum must be one which the principal has authorized the agent to sign as a record of the transaction. The letters in the present case were not written as a record of the transaction, and there is nothing to shew that the officers who signed them were authorized to sign them as

(1) The learned judge decided in favour of the defendants on other points than that to which this report relates.

(2) (1877) 2 Q. B. D. 314.

(3) 3 Ch. D. 49.

a record of the terms of an agreement between the plaintiffs and the defendants.

Cur. adv. vult. (1)

July 13. The written judgment of the Court (A. L. Smith L.J., Rigby L.J., and Vaughan Williams L.J.) was delivered by

A. L. SMITH L.J. [After dealing with other questions in the case, the learned Lord Justice proceeded as follows:—] If, therefore, it is established, as it has been by the plaintiffs, that the defendants have broken this contract, and have not allowed the plaintiffs discounts according to its terms, in the first place it matters not, as it seems to me, whether there is an agreement sufficient to satisfy the 4th section of the Statute of Frauds, for the defendants have moneys in hand which the plaintiffs are entitled to; but I also say that there is ample evidence upon the letters to satisfy the statute. Our attention has been called to the case of *Smith* v. *Webster* (2) as an authority for the proposition that no recognition by the officers of the company of the contract by their signature will avail to take the case out of the operation of the 4th section of the Statute of Frauds, unless such officers had authority to sign a record of the contract as such; but I do not think that the case of *Smith* v. *Webster* (2) bears this out, although some of the language of Lush L.J. might bear that interpretation. It is undoubted law that the party to the contract himself may, by signing a document subsequent to that containing the terms of the contract, recognise the contract in the way required by the 4th section of the Statute of Frauds.

(1) Many other questions arose beside that with reference to which this case is reported, namely, whether, apart from the question as to the Statute of Frauds, the defendants must be taken by their conduct to have bound themselves to the terms of the agreement in the schedule to the memorandum of February 13, 1896, whether, if so, the defendants had broken the agreement by allowing larger discounts to other agents appointed by them than they had allowed to the plaintiffs, and whether they had wrongfully cancelled their agreement with the plaintiffs. The arguments and so much of the judgment as related to these other questions are omitted from the report as not involving any reportable matter.

(2) 3 Ch. D. 49.

C. A. 1899

JOHN GRIFFITHS CYCLE CORPORATION, LIMITED v. HUMBER & CO., LIMITED.

A. L. Smith L.J.

It is also undoubted law that a signature to a document which contains the terms of a contract is available for the purpose of satisfying s. 4 of the statute, though put alio intuitu and not in order to attest or verify the contract: *Jones* v. *Victoria Dock Co.* (1) It is to be observed that in this case the signature which was held to be sufficient was the signature by the chairman of a joint stock company of a minute recording the proceedings of the company. It seems to me that all that is decided by *Smith* v. *Webster* (2) is that, if reliance is placed on the signature of an agent, as satisfying the 4th section of the Statute of Frauds, you must, whether the document signed be a record of the terms or a document referring to and recognising the document containing the record of the terms, shew that the agent signing was an agent "thereunto lawfully authorized," but that is all that is necessary. In *Smith* v. *Webster* (2) the person said to be the agent thereunto lawfully authorized was a solicitor. He was not expressly authorized to sign any document recognising the document which in fact contained the proposed terms, and the Court held that it was not within the scope of his authority so to do. But in the present case there are abundance of letters written by the manager of the company within the scope of his authority recognising and insisting on the terms contained in the contract sued on. The point upon the Statute of Frauds does not avail the defendants.

[The Court decided the other questions raised on the appeal in favour of the plaintiffs, and allowed the appeal.]

Appeal allowed.

Solicitors for plaintiffs: *John B. & F. Purchase.*
Solicitors for defendants: *Wilson, Bristows & Carpmael.*

(1) 2 Q. B. D. 314.

(2) 3 Ch. D. 49.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1899
July 1, 14.

SOFTLAW *v.* WELCH.

Husband and Wife—Action against Widow on Contract made during Coverture —Form of Judgment.

Where judgment is recovered in an action against a widow upon a contract entered into by her during coverture after the passing of the Married Women's Property Act, 1882, and before the passing of the Married Women's Property Act, 1893, the plaintiff is not entitled to a judgment in the ordinary form as though the defendant were a feme sole; he can only sign judgment in the form settled by the Court of Appeal in *Scott* v. *Morley*, (1887) 20 Q. B. D. 120, in an action against a married woman, with such verbal alterations as are necessary to adapt that form to a judgment against a widow.

APPEAL from chambers.

The defendant, a widow, was sued upon contracts made by her during coverture and before the passing of the Married Women's Property Act, 1893, the action being brought to recover 273*l.* 7*s.* 2*d.* on certain promissory notes made by the defendant, with an alternative claim as to 100*l.* thereof upon a covenant in a mortgage deed executed by her; these transactions took place in 1888 and 1891, while her husband was alive. The writ in the action was issued on May 9, 1899, the defendant's husband being then dead. An application was made by the plaintiff under Order XIV. for leave to sign final judgment, and an affidavit was made by the defendant that at the time of contracting the debt she was a married woman, that the debt was incurred by her in respect of her separate estate, and that her husband had left her no estate whatever. The master gave the plaintiff leave to sign final judgment in the ordinary form, as though the defendant had been a feme sole. Upon appeal, Channell J. set aside the order of the master, and made an order that the plaintiff be at liberty to sign judgment for the amount indorsed on the writ with interest and costs, that as regards the defendant such sum and costs should be payable out of her separate estate as thereinafter

C. A. 1899

SOFTLAW v. WELCH.

mentioned and not otherwise, and that execution should be limited to such property as during her coverture was the defendant's separate property not subject to any restraint against anticipation, unless by s. 19 of the Married Women's Property Act, 1882, the property should be liable to execution notwithstanding such restriction. (1) The plaintiff appealed.

Arthur Powell, for the plaintiff. The limitation of the judgment was wrong; the defendant, being discovert, has now, and had at the date of the writ, nothing which can be called separate property; she has all the rights, and is subject to all the liabilities, of a feme sole. Before the Married Women's Property Act, 1882, a married woman could not make a binding contract at law; she could only make contracts in the nature of promises which a court of equity would enforce against her separate estate, which was itself the creature of equity, and such contracts were only enforceable against so much as might remain of the separate property which she had at the date of the contract: *Pike* v. *Fitzgibbon*. (2) The Act of 1882 gave a married woman power to hold property apart from her husband, and gave her a right to contract under certain limitations; that Act did not merely give a remedy against her property, but a remedy against herself, for in s. 1, sub-s. 2, it speaks of her "rendering herself liable" upon her contracts. Having separate property in respect of which she could contract, she became herself liable as a debtor, and the judgment against her was a personal judgment, the fruits of which were, however, limited to her separate estate. So clearly is it recognised that she is a debtor that a judgment against her can be made the foundation of garnishee proceedings: *Holtby* v. *Hodgson* (3), in which case Lindley L.J. says (4): "Suppose her husband were to die, the restraint would be gone, the judgment would bind her, and execution could be issued upon it." In other words, the Act

(1) It was stated during the argument that at the date of the contracts the defendant had no separate property not subject to a restraint against anticipation; but the point was not taken on behalf of the defendant, as it had been admitted at chambers that the plaintiff was entitled to judgment in some form.

(2) (1881) 17 Ch. D. 454.

(3) (1889) 24 Q. B. D. 103.

(4) 24 Q. B. D. 108.

of 1882 only limits a plaintiff's remedy to the separate estate of a married woman so long as the coverture lasts; when that is at an end, the remedies against her are coextensive with those against a feme sole. In the present case the plaintiff is not seeking to avail himself of more extensive remedies against the property of a widow against whom judgment has been recovered during coverture, for the action was not brought until she was discovert. The decision in *Beckett* v. *Tasker* (1), where the action was brought after the death of the husband, and property settled with restraint upon anticipation was held not liable to satisfy the judgment, is wrong and should be overruled. But that case and *Pelton* v. *Harrison* (2) are distinguishable, for in both of them judgment had been signed in the form settled in *Scott* v. *Morley* (3), and the question was what in those circumstances were the rights of the judgment creditor; here the question is as to the proper form of judgment. [He also cited *Jay* v. *Robinson* (4); *Hood Barrs* v. *Cathcart* (5); *Hood Barrs* v. *Heriot.* (6)]

Wootten, for the defendant. The order was right. The status of the defendant at the time of the contracts, not at the date of the judgment, is what must be looked at, and, the contracts having been made before the passing of the Married Women's Property Act, 1893, her liability depends entirely upon the Act of 1882. Although in actions against married women the Legislature has extended the remedy of a plaintiff so far as relates to the area of property liable to satisfy a judgment against the defendant, it has not altered the nature of the remedy, and a personal judgment, involving all the ordinary incidents of a personal judgment, cannot be obtained against a married woman who is sued on a contract made during coverture. If the liability of a married woman under the Act of 1882 is only proprietary, then *Pike* v. *Fitzgibbon* (7) is still an authority, subject of course to the extension by that Act of the area of property liable to satisfy the judgment; if, however,

(1) (1887) 19 Q. B. D. 7.
(2) [1891] 2 Q. B. 422.
(3) 20 Q. B. D. 120.
(4) (1890) 25 Q. B. D. 467.
(5) [1894] 2 Q. B. 559.
(6) [1896] A. C. 174.
(7) 17 Ch. D. 454.

C. A. 1899

SOFTLAW v. WELCH.

the liability is personal (which is apparently the effect of the decision in *Holtby* v. *Hodgson* (1)), then it is subject to the limitations in s. 1, sub-s. 2, of the Act. The dictum of Lindley L.J. in *Holtby* v. *Hodgson* (1) was unnecessary for the decision of that case, and is not binding. A married woman had under the Act of 1882 only a limited power of contracting, so as to bind her separate property, and those limitations do not disappear upon her becoming discovert; it was only in respect of her separate property that she could contract and the death of her husband did not render liable to satisfy a judgment other property in respect of which she had no power to contract. The decisions in *Beckett* v. *Tasker* (2) and *Pelton* v. *Harrison* (3) are in point, and should be followed. [He also cited *Palliser* v. *Gurney* (4); *Stogdon* v. *Lee* (5); *In re Hewett, Ex parte Levene* (6); *Harrison* v. *Harrison* (7); *Aylesford* v. *Great Western Ry. Co.* (8); *In re Lynes, Ex parte Lester & Co.* (9)]

Arthur Powell, in reply, referred to *Whittaker* v. *Kershaw*. (10)

July 14. The following written judgment was delivered by

VAUGHAN WILLIAMS L.J. This is an appeal from the decision of Channell J. at chambers, given on appeal from the order of Master Manley Smith.

The action is brought by the plaintiff against the defendant, Lucy Price Welch, a widow, to recover 273*l.* 7*s.* 2*d.*, principal and interest due on three promissory notes: two of such notes being notes made by the defendant alone during coverture, and the other note being a joint and several note signed by the defendant and her husband, also made during coverture; alternatively, there is in respect of the 100*l.*, subject of the last-mentioned note, a claim against the defendant on a covenant contained in a mortgage deed executed by the defendant and her husband. These contracts were all made

(1) 24 Q. B. D. 103.
(2) 19 Q. B. D. 7.
(3) [1891] 2 Q. B. 422.
(4) (1887) 19 Q. B. D. 519.
(5) [1891] 1 Q. B. 661.
(6) [1895] 1 Q. B. 328.
(7) (1888) 13 P. D. 180.
(8) [1892] 2 Q. B. 626.
(9) [1893] 2 Q. B. 113.
(10) (1890) 45 Ch. D. 320.

prior to the passing of the Married Women's Property Act, 1893. Application was made by the plaintiff for judgment under Order XIV. The defendant put in an affidavit stating that at the time she contracted the debt sued for in this action she was a married woman, and that the debt was incurred by her in respect of her separate estate only. Master Manley Smith made an order giving the plaintiff leave to sign judgment; the defendant appealed, and Channell J. ordered the judgment signed under Master Manley Smith's order (which was a judgment in the ordinary form, as if the defendant had been a feme sole) to be set aside, and ordered that the plaintiff should be at liberty to sign judgment against the defendant for the amount indorsed on the writ with interest and costs, and that as regards the defendant such sum and costs be payable out of her separate property as thereinafter mentioned and not otherwise, and that execution on such judgment should be limited to such property as during her coverture was her separate property not subject to any restraint against anticipation, unless by s. 19 of the Married Women's Property Act, 1882, the property should be liable to execution notwithstanding such restriction. From that order of Channell J. the plaintiff now appeals to us.

It was stated in argument, and not denied, that at the date of the making of the promissory notes sued on and of the execution of the mortgage deed the defendant had no separate estate not subject to restraint against anticipation. The argument before us on behalf of the plaintiff was that, the death of the husband having put an end to the restraint on anticipation, the plaintiff, in an action which he commenced after the husband's death against his widow, was entitled to judgment against her as a feme sole, and not in the *Scott* v. *Morley* (1) form as ordered by Channell J. In other words, it was argued on behalf of the plaintiff that a married woman who during coverture made a promissory note thereby became the personal debtor of the person in whose favour the note was made, and that the restraint on anticipation being removed by the death of the husband, the plaintiff was entitled to sue the widow on

(1) 20 Q. B. D. 120.

C. A. 1899

SOFTLAW v. WELCH.

Vaughan Williams L.J.

the notes made during coverture as a feme sole and to have the ordinary judgment against her as such. But, in my judgment, the effect of the death of the husband is not to enlarge the right which the creditor theretofore had against the married woman. It seems to me clear from the judgment of Kay L.J. in *Pelton* v. *Harrison* (*No.* 1) (1) (which was the judgment of the whole Court) that if the judgment is, as it was in that case, in the *Scott* v. *Morley* (2) form, such a judgment cannot after the death of the husband, and the determination of the restraint on anticipation consequent thereon, be enforced against property as to which during coverture she was restrained from anticipation. It may be urged that the judgment in *Pelton* v. *Harrison* (1) may be supported as being based on the *Scott* v. *Morley* (2) form of the judgment which in that case was sought to be enforced against the widow; but I think it is clear from the latter part of the judgment that Kay L.J. meant to decide the case on principle and not on the form of the judgment. He seems to me to put it quite plainly that the Married Women's Property Act, 1882, did not intend to enable a married woman by a contract entered into by her during coverture to incur any liability except in respect of and to the extent of her separate property held by her during coverture without restraint on anticipation, or, as it has been called, her free separate property, and that the Act did not intend to make liable on such a contract during coverture, or a judgment obtained in an action brought to recover a debt arising on such a contract, property acquired by her after the death of her husband, nor any property, though separate property, as to which during coverture she was restrained from anticipation. This construction of the Married Women's Property Act, 1882, accords with the judgment of the Divisional Court in *Beckett* v. *Tasker* (3), and in particular the judgment of Wills J. This construction of the Act also accords with the views expressed by the Court of Appeal in *Scott* v. *Morley* (2), that the Married Women's Property Act, 1882, is a new provision imposing upon a married woman's separate estate a liability at law corresponding

(1) [1891] 2 Q. B. 422. (2) 20 Q. B. D. 120.
(3) 19 Q. B. D. 7.

to the liability that before could only be produced by proceedings in equity, which took the form of a declaration charging her separate estate with the amount of the debt: see the judgment of Lord Esher M.R.

At common law a married woman during coverture could not personally enter into any contract, and Bowen L.J. says in *Scott* v. *Morley* (1) that the liability of a married woman upon her contracts is the creature of the section (s. 1, sub-s. 2, of the Married Women's Property Act, 1882), and as the section begins by limiting her liability to the extent of her separate property, so it ends by repeating that satisfaction is only to be obtained out of her separate property. It seems to me that this clearly means the separate property which the Act has enabled her to charge by her contracts during coverture—that is, her free separate property owned by her at the date of such contract or coming to her during coverture. The cases of *Palliser* v. *Gurney* (2) and *Tetley* v. *Griffith* (3), which decide that a married woman who has no separate property is incapable of entering into a contract at all, also go to shew that the only contracts which the Married Women's Property Act, 1882, enable a married woman to make during coverture are contracts affecting her free separate property held by her as such during coverture.

The only authority which at all conflicts with this continuous line of decisions is *Holtby* v. *Hodgson* (4), or rather the dictum of Lindley L.J. in his judgment in that case to the effect that separate property that she (the wife) is restrained from anticipating, which cannot be got at in any way while her husband is living, becomes immediately subject to the judgment as soon as he is dead. The judgment itself in *Holtby* v. *Hodgson* (4) involves no such proposition. The husband in that case was alive, and the only question in the case was whether a judgment obtained against a married woman in her husband's lifetime, substantially in the *Scott* v. *Morley* (1) form, in an action on a contract made by her during coverture, could be enforced by

(1) 20 Q. B. D. 120.
(2) 19 Q. B. D. 519.
(3) (1887) 57 L. T. 673; 36 W. R. 96.
(4) 24 Q. B. D. 103.

C. A. 1899

SOFTLAW v. WELCH.

Vaughan Williams L.J.

a garnishee order under Order XLV., r. 1, attaching a judgment debt due on a judgment recovered by her in an action for malicious prosecution brought by her during coverture. Two points were argued. First, it was said that the judgment against the married woman only created a proprietary liability, and that such a judgment was not a judgment or order for the payment of money within the meaning of those words in Order XLV., r. 1, and, further, that the judgment did not make a married woman a debtor within the meaning of that order; but the Court decided that such a judgment was a judgment for the payment of money, and that the married woman was a debtor personally liable although execution was limited to her separate estate. Secondly, it was urged that the judgment obtained by the married woman did not create a debt due to her, but only gave her damages as part of her separate estate. The Court held that the judgment created an attachable debt. There is nothing in this judgment, or in the finding that a married woman is under such a contract a personal debtor, inconsistent with the limitation of the contracting power of a married woman, or with the limitation of the satisfaction of damages recovered against her to separate property coming to her possession during coverture, which seem to me to be the limitations established by the cases to which I have called attention.

The case of *Holtby* v. *Hodgson* (1) was followed in *Pelton* v. *Harrison* (*No.* 2) (2) by Lopes and Kay L.JJ., a case in which it was held that a judgment against a married woman is a personal one, although enforceable against her separate estate only, and that costs due to a married woman in respect of an interlocutory application might be satisfied by an order for set-off under Order LXV., r. 27, sub-r. 21, of costs due from the married woman under a judgment in the *Scott* v. *Morley* (3) form. *Pelton* v. *Harrison* (*No.* 1) (4) was cited, but neither Lopes L.J. nor Kay L.J. seem to have considered that case inconsistent with *Holtby* v. *Hodgson*. (1) It is further to be observed that both in *Pelton* v. *Harrison* (4) and in *Beckett* v.

(1) 24 Q. B. D. 103.
(2) [1892] 1 Q. B. 118.
(3) 20 Q. B. D. 120.
(4) [1891] 2 Q. B. 422.

Tasker (1) the judgment in the *Scott* v. *Morley* (2) form was obtained in actions brought after the death of the husband.

Having thus gone through the authorities, I have come to the conclusion that the order of Channell J. was right in principle, that is to say, that the *Scott* v. *Morley* (2) form is the right form of judgment whenever the action is brought on a contract made by a married woman during coverture; but a difficulty arises in this case, because counsel for the defendant admitted before us that he could not take the point that there ought to be no judgment against his client, because he had admitted before master and judge that in some form judgment must go, and on the facts as stated in argument there was no free separate estate at the date of the contracts (namely, the promissory notes), by reason of all the wife's property being subject to restraint against anticipation. It is said that this makes a *Scott* v. *Morley* (2) form of judgment impossible, and that, therefore, the judgment must, on the admission that there must be some judgment, be in the ordinary form; but I do not think we ought on this to order judgment in the ordinary form. I think that defendant's counsel has only precluded himself from setting up the fact that at the date of the alleged contract there was no free separate estate and claiming judgment for the defendant, as was successfully claimed in *Tetley* v. *Griffith*. (3)

A. L. SMITH L.J. I am of the same opinion, and I only desire to add that in my judgment the fact of a married woman becoming discovert does not, apart fron the provisions of the Act of 1893, extend her liability upon contracts made by her during coverture.

Appeal dismissed.

Solicitors for plaintiff: *Stock & Slater.*
Solicitors for defendant: *Layton, Sons & Lendon.*

(1) 19 Q. B. D. 7. (2) 20 Q. B. D. 120.
(3) 57 L. T. 673; 36 W. R. 96.

W. J. B.

C. A.
1899
June 16, 20.

[IN THE COURT OF APPEAL.]

PRITCHETT *v.* ENGLISH AND COLONIAL SYNDICATE.

Practice—Attachment of Debt—Garnishee Order, Action upon—Judgment—Company — Winding-up — Creditor — Rules of Supreme Court, 1883, *Order* XLII., *r.* 24; *Order* XLV.

An action for debt will lie on a garnishee order, but should not be resorted to if the amount can be recovered by execution under Order XLV., r. 3.

A garnishee order absolute had been obtained, under Order XLV., r. 3, against a limited company having property abroad, but none in this country on which execution could be levied:—

Held, by the Court of Appeal, that under Order XLII., r. 24, the garnishor could maintain an action on the garnishee order for the debt thereby ordered to be paid to him by the company, the garnishees, with a view to his presenting a petition, as a judgment creditor, for winding up the company.

Decision of Phillimore J. affirmed.

In re Combined Weighing and Advertising Machine Co., (1889) 43 Ch. D. 99, considered.

THIS was an action by Messrs. Pritchett & Young against the English and Colonial Syndicate, Limited, claiming by the writ, specially indorsed under Order III., r. 6, a sum of 99*l.* 6*s.* 7*d.* payable by the defendants to the plaintiffs under a garnishee order, the particulars of claim being as follows: "By a garnishee order absolute dated 20th April; 1899, made in an action, Pritchett & Young, creditors, against Walter Holdsworth, udgment debtor, and the present defendants garnishees, the defendants were thereby ordered to pay to the said Pritchett & Young the sum of 99*l.* 6*s.* 7*d.*"

The garnishee order in question was an order absolute made in chambers under Order XLV., r. 3, upon the application of the plaintiffs, Pritchett & Young, on an affidavit of service. It adopted Form No. 40 in Appendix K to the rules, and was as follows: "Upon hearing the solicitors for the judgment creditors and upon reading the affidavit of, &c., and the order nisi made herein dated the 13th day of April, 1899, whereby it was

ordered that all debts owing or accruing due from the above-named garnishees to the above-named judgment debtor should be attached to answer a judgment recovered by the above-named judgment creditors in the High Court of Justice on the 27th day of April, 1898, for the sum of 3495*l.* 9*s.* 4*d.* debt, and 9*l.* 15*s.* 10*d.* costs, on which judgment the sum of 3173*l.* 19*s.* 7*d.* remained due and unpaid: It is ordered that the said garnishees do forthwith pay to the said judgment creditors 99*l.* 6*s.* 7*d.*, the debt due from them to the said judgment debtor, and that in default thereof execution may issue for the same."

On May 12, 1899, the plaintiffs obtained in the present action an order from the master giving them leave to sign final judgment against the defendants for the amount indorsed on the writ, and costs.

On May 15th, 1899, Phillimore J. made an order dismissing an appeal by the defendants from the master's order, whereupon the defendants appealed to the Court of Appeal from the learned judge's order.

It appeared that the defendants, the syndicate, had no assets in this country against which the plaintiffs could levy execution for the 99*l.* 6*s.* 7*d.*, under Order XLV., r. 3, but had property abroad which could be made available in case of a winding-up. The avowed object, therefore, of the plaintiffs in bringing this action on the garnishee order was to enable them to obtain judgment against the syndicate and thus, as judgment creditors, to present a winding-up petition.

The appeal was heard on June 16, 1899.

A. Llewelyn Davies, for the defendants. The question is whether a garnishor can bring an action on his garnishee order instead of proceeding to levy execution under Order XLV., r. 3. An action will not lie on a garnishee order. The attachment of debts by garnishee order is dealt with by Order XLV. Rule 1 provides for the making of the garnishee order; rule 2 says that service of the order or notice of it to the garnishee shall bind the debt in his hands; and rule 3 provides that if he has failed to pay the debt into court, or to appear, as is the case here, execution

C. A. 1899

PRITCHETT v. ENGLISH AND COLONIAL SYNDICATE.

may be issued against him. These rules are in accordance with s. 61, now repealed, of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), and the joint effect of the order nisi and order absolute under the present rules is to bind the debt. A garnishee order is no foundation for an action: the garnishor does not become a creditor, but merely obtains a charge or lien on the debt. There is no express authority that an action cannot be brought on a garnishee order, but there are decisions indirectly so deciding. For instance, it has been held that a garnishee order does not operate as a transfer of the debt: *In re Combined Weighing and Advertising Machine Co.* (1) The ground of the decision in that case was that the relation of garnishor and garnishee was a new relation given by statute and must be exercised in the way stated and no other. *Chatterton* v. *Watney* (2) is an authority to the same effect.

[ROMER J. referred to *Jones* v. *Farrell.* (3)]

Again, it has been held that a garnishee order absolute is not a "final judgment" against the garnishee within the Bankruptcy Act, 1883, so as to be the foundation of a bankruptcy notice against the garnishee: *Ex parte Chinery.* (4) The statutory remedy for recovering a debt under a garnishee order is by levying execution; and, where a special remedy is given by statute, that remedy must be followed, and no other can be supposed to exist: *Bailey* v. *Bailey.* (5) Thus, a balance order under the Companies Act, 1862, being a creation of that statute, can only be enforced in the manner there directed: it is not a "judgment" and has not the effects of a judgment: *Westmoreland Green and Blue Slate Co.* v. *Feilden.* (6) A foreign judgment of itself creates no debt, though the appropriate action to enforce it in this country is an action of debt: *Walker* v. *Witter.* (7) An action can only be brought on a judgment, not on an order such as an interlocutory order. No doubt an action has been held to lie on an order for payment of costs,

(1) 43 Ch. D. 99, 103–4.
(2) (1881) 17 Ch. D. 259.
(3) (1857) 1 De G. & J. 208.
(4) (1884) 12 Q. B. D. 342.
(5) (1884) 13 Q. B. D. 855, 859.
(6) [1891] 3 Ch. 15.
(7) (1778) 1 Dougl. 1.

but that is because an order for costs has been held to be in effect a judgment. [He also referred to Chitty on Pleading, 7th ed. vol. i. p. 119, and Bullen and Leake on Pleading, 3rd ed. p. 194.]

Montague Lush, for the plaintiffs. The company's only property is abroad, and there is nothing on which the plaintiffs can levy execution. If they cannot bring an action on this garnishee order, it is a strange anomaly; for they have a positive order that the garnishees "do forthwith pay" the plaintiffs the 99*l.* 6*s.* 7*d.* The proposition that a garnishee order does not create the relation of debtor and creditor may be conceded; but it is not true that an action cannot be brought unless the relation of debtor and creditor exists. The obligation to pay implies the right to bring an action. No doubt, a foreign judgment creates no debt; but by the comity of nations the Courts here will enforce the judgment, although there is no contractual relation. Again, in *Godfrey* v. *George* (1) it was held that an action would lie upon an order on a solicitor to pay the costs of an application to strike him off the rolls. *Bailey* v. *Bailey* (2), which was discussed in *Kerr* v. *Kerr* (3), is distinguishable. The decision was on the effect of the Divorce Act (20 & 21 Vict. c. 85), it being held that, if an order was made for payment of alimony and the person ordered to pay did not pay, there was no such obligation to pay as would be the foundation for an action. It was also held that an order of the Divorce Court for alimony did not create such an order to pay as the common law courts would take notice of: and it was further said that an action would not lie at common law to enforce a decree of the Court of Chancery. But here the plaintiffs are suing in a court of common law upon an order made by a court of common law. It may be admitted that, as in *Godfrey* v. *George* (1), the order did not create a legal debt; but if an action lay in that case it follows that the plaintiffs can sue on the order in the present case. The order is an order to "pay." The point that there was another remedy other than by action was argued in *Godfrey* v. *George* (1); but

(1) [1896] 1 Q. B. 48. (2) 13 Q. B. D. 855.
(3) [1897] 2 Q. B. 439.

C. A. 1899

PRITCHETT v. ENGLISH AND COLONIAL SYNDICATE.

Lord Esher M.R. said (1): "Where a person has two remedies, he may pursue them both, and, unless his claim is satisfied by means of one of them, he is not prevented from pursuing the other." That case is decisive on the point. The question as to how far an order to pay by the Court can be enforced when a remedy by execution has been created by statute or rules, was discussed in *Hutchinson* v. *Gillespie*. (2) The plaintiffs rely on Order XLII., r. 24, which says that, "Every order of the Court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect."

Llewelyn Davies, in reply. The only case in which an action will lie on an order other than a final judgment is that of an order for payment of costs, and that is because it is "in the nature of a judgment": *Godfrey* v. *George* (3); *Philpott* v. *Lehain* (4); *In re Boyd* (5); *Norton* v. *Gregory*. (6) The whole question is whether a garnishee order has the same effect as a judgment, and *Ex parte Chinery* (7) is conclusive that it has not, and that such an order is on an entirely different footing from a judgment. Garnishee proceedings are a special privilege with a special remedy. Rule 24 of Order XLII. does not authorize an action to be brought on an order: it only means that an order may be enforced in the same manner as a judgment—that is, by execution.

Cur. adv. vult.

June 20. LINDLEY M.R. The question raised by this appeal is not free from difficulty. It is whether an action for debt can be supported by a garnishee order. It appears that the plaintiffs Pritchett & Young obtained judgment in the ordinary way against one Holdsworth for a large sum of money —3495*l.* 9*s.* 4*d.*—and that the present defendants, the English and Colonial Syndicate, Limited, owed Holdsworth a smaller sum of 99*l.* 6*s.* 7*d.* Pritchett & Young have obtained, in the

(1) [1896] 1 Q. B. 51.
(2) (1856) 11 Ex. 798.
(3) [1896] 1 Q. B. 48.
(4) (1877) 35 L. T. (N.S.) 855.
(5) [1895] 1 Q. B. 611.
(6) (1895) 73 L. T. (N.S.) 10.
(7) 12 Q. B. D. 342.

ordinary way and in the ordinary form, a garnishee order absolute upon the syndicate. That order follows the common form No. 40 given in Appendix K to the Rules of Court, and the operative part of it runs thus: "It is ordered that the said garnishees do forthwith pay to the said judgment creditors 99*l.* 6*s.* 7*d.*, the debt due from them to the said judgment debtor, and that in default thereof execution may issue for the same." There is no doubt whatever that that is an order upon the syndicate, the garnishees, to pay to the plaintiffs, Pritchett & Young, the money due to the judgment debtor, Holdsworth. It is quite true that before that order was made there was no debt owing by the syndicate to Pritchett & Young: the debt was owing by Holdsworth, and the order is, in substance, not an order to pay a debt, but an order on the garnishees, the syndicate, to hand over something in their hands belonging to Holdsworth to Pritchett & Young.

In Order XLV. of the Rules of Court, 1883, which relates to garnishee orders, there is a series of rules stating what the procedure by a judgment creditor for attaching a debt shall be. Rule 1 states how a garnishee order attaching a debt may be obtained. Rule 2 states what shall be the consequence of such an order; and there is a complete code providing for enforcing payment of a debt by this method. The form given in the Appendix shews that it is not an order to pay a debt due from the garnishee to the garnishor, the judgment creditor, but to pay a debt due from the garnishee to some one else, that is the judgment debtor: and the rules provide that obedience to the order is to be a complete discharge to the garnishee as against the judgment debtor—that is to say, he is not to be liable to be attacked again in respect of the same debt.

In the present case it is found that Pritchett & Young cannot get their 99*l.* 6*s.* 7*d.* out of the company by issuing execution in the ordinary way. The company have no assets in this country which can be taken, although they have property abroad which can be made available if the company is wound up: and this action, which is a very unusual one, has been brought by Pritchett & Young with the avowed object of getting a judgment against the company and availing

C. A. 1899

PRITCHETT v. ENGLISH AND COLONIAL SYNDICATE.

Lindley M.R.

themselves of that judgment to obtain a winding-up order. It has already been decided that a winding-up order cannot be made upon the ordinary garnishee order itself; and this is an attempt to get a judgment on which a winding-up order can be made.

We have looked into the cases on the subject, and the conclusion at which we have arrived is this. Order XLII., r. 24, on which the defendants rely, runs thus: "every order of the Court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." The plaintiffs rely on that rule and say that they want to enforce this garnishee order by means of an action as if the order were a judgment. If this were res nova, which it is not, I should have thought that Order XLII. referred to enforcing orders by writ of execution, and to nothing else, and that rule 24 was put in to enable an order, as distinguished from a judgment, to be enforced by execution. I should have doubted whether it enabled an order, as distinguished from a judgment, to be enforced by action: but it was decided in *In re Boyd* (1) that an action might be brought on an order for payment of costs, and that a judgment in that action was a good ground for a bankruptcy notice. And in *Godfrey* v. *George* (2) it was distinctly decided that the word "enforced" in rule 24 of Order XLII. includes enforcing by action as well as enforcing by execution.

The rule having been construed in that way, we cannot now construe it otherwise. I do not, therefore, see how we can say that the present action will not lie. We cannot differ from the cases to which I have referred without construing the rule more narrowly than it has been construed hitherto. Those decisions and this decision will not be inconsistent with other cases which have been referred to. It was said that they are inconsistent with the decisions which shew that an action will not lie on a balance order, as, for instance, *Westmorland Green and Blue Slate Co.* v. *Feilden* (3); but a balance order is merely an order for the collection of assets—that is, an order to

(1) [1895] 1 Q. B. 611. (2) [1896] 1 Q. B. 48.
(3) [1891] 3 Ch. 15.

pay to the liquidator of a company a sum of money due to the company; and it may well be that an action will not lie upon such an order, but that the only way to enforce it is by execution in the ordinary way, and that it is not such an order as is contemplated by Order XLII., r. 24.

The decisions of this Court that garnishee orders and balance orders are not final judgments, and therefore are not alone foundations for bankruptcy notices, are not inconsistent with our present decision, for they turn upon the true construction of the Bankruptcy Act and the technical meaning of the words "final judgment." It is pointed out in *In re Combined Weighing and Advertising Machine Co.* (1) that a garnishee order absolute is not a final judgment.

The conclusion is that this action will lie, and we cannot order the claim to be struck out or say that the decision appealed from is wrong. But, although an action will lie, still if a person who has obtained a garnishee order brings an action upon it without any necessity he will run the risk of having it stayed as an abuse of the process of the Court, and probably have to pay the costs. It is obvious that, if the amount to be paid can be obtained by execution, but instead of that he incurs the expense of an action, that is an abuse of the process of the Court. That observation, however, does not apply in this case: the plaintiffs cannot obtain payment without an action, and that is their justification for bringing it.

The only further remark that I will make is that, having regard to Order XLV., r. 7, it is plain, on the language of that rule, that if the plaintiff, the judgment creditor, does obtain payment from the garnishee in obedience to a judgment or under execution on it, the payment will discharge the garnishee as if the payment had been made without action; so that in the present case the syndicate will be protected from having to pay twice over.

ROMER L.J. I agree that this appeal should be dismissed for the reasons stated by the Master of the Rolls. In this case Order XLII., r. 24, as interpreted by *Godfrey* v. *George* (2), acts

(1) 43 Ch. D. 99. (2) [1896] 1 Q. B. 48.

C. A. 1899

PRITCHETT v. ENGLISH AND COLONIAL SYNDICATE.

Romer L.J.

beneficially and enables the Court to remove some of the difficulty caused by the decision in *In re Combined Weighing and Advertising Machine Co.* (1)

That decision is binding on us: but, seeing that in garnishee proceedings the order absolute contains an order that the garnishee do pay direct to the garnishor, the judgment creditor, I am surprised that the Court in the last-mentioned case did not see its way to hold that the judgment creditor there was entitled to petition to wind up the company.

Appeal dismissed.

Solicitors: *Sutton, Ommaney & Rendall; Spyer & Son.*

G. I. F. C.

1899 *July* 25.

ANDERSON *v.* VICARY.

Game—Ground Game Act, 1880 (43 & 44 *Vict. c.* 47)—*Whether Owner occupying his own Land can have Rights of Killing Ground Game under the Act.*

The owner of land granted to the plaintiff a lease of the exclusive right of sporting upon the land, and subsequently during the currency of the lease sold the freehold to the defendant, who entered into occupation of it. The defendant caused the rabbits on the land to be trapped, claiming as occupier a right to do so under the provisions of the Ground Game Act, 1880, whereupon the plaintiff brought an action for infringement of his exclusive right of sporting:—

Held, that the defendant, being the occupier, was entitled under the Ground Game Act to kill the ground game, none the less because he happened to be also the owner.

FURTHER CONSIDERATION before Wright J.

By an agricultural lease dated January 18, 1893, John Harris leased a farm called Northcombe, in the parish of Bovey Tracey, in the county of Devon, and being a portion of the Plumley estate, to William Wrayford for the term of twenty-one years, reserving the game and rabbits (subject as to the rabbits to the Ground Game Act, 1880) and the sole right of

(1) 43 Ch. D. 99.

hunting, coursing, and shooting. By a lease dated August 31, 1895, John Harris granted to the plaintiff a lease for five years from January 1, 1896, of Plumley House, together with the exclusive right of shooting, sporting, and preserving upon the whole of the Plumley estate. By a deed dated January 13, 1898, John Harris conveyed to the defendant the freehold of the farm of Northcombe, then under lease to Wrayford. The defendant subsequently procured Wrayford to surrender his lease of Northcombe, and the defendant entered into occupation of the farm in September, 1898, and farmed the land himself. Finding that the rabbits on the farm were doing damage to his crops, the defendant caused them to be trapped. The plaintiff thereupon brought this action for damages and an injunction to restrain the defendant from infringing his exclusive right of sporting. The defendant claimed that he was entitled to trap the rabbits by virtue of the provisions of the Ground Game Act, 1880.

Bodilly, for the plaintiff. The Ground Game Act does not apply to an occupier who is also the owner. In *Smith* v. *Hunt* (1) it was held that s. 6 of the Act, which prohibits any person having the "right of killing ground game under this Act or otherwise" from (inter alia) employing spring-traps except in rabbit-holes, did not apply to the owner of the soil even though in occupation. The Court there went upon the ground that although the wide language of s. 6 taken by itself would be applicable to an owner, it must be read as controlled by the general policy of the Act, which, as indicated by the earlier sections, was to apply the Act only to tenant occupiers. The Act was intended only to protect tenants against their landlords, not to protect landowners against themselves.

Foote, Q.C., and *Clavell Salter*, for the defendant.

July 25. WRIGHT J. The question here is whether the Ground Game Act applies to the case of an occupier who is also the owner of the land, so as to give him the right of trapping rabbits, notwithstanding that his predecessor in title

(1) (1885) 54 L. T. 422.

1899

ANDERSON v. VICARY.

Wright J.

had conveyed the sporting rights to another person. It has indeed been held as to s. 6 of that Act, by Mathew and Smith JJ. in *Smith* v. *Hunt* (1), that that section does not apply to an occupier who is also the owner, and in so deciding they are reported to have used language suggesting that the Act as a whole did not apply to an occupying owner. But I think that the real effect of the judgment is limited to s. 6, and that it is not an authority as to the effect of the Act as a whole. That being so, I have to decide as well as I can what the scope of the Act is; and I think that, apart from s. 6, the governing intention is that there should be no land in the kingdom over which the occupier may not kill the ground game, and it seems to me that the benefit of that Act is just as much required by an owning occupier, as against previous grants by his predecessor in title which might limit the right, as it is by any other occupier. There must be judgment for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *Mann & Crimp, for Hacker & Michelmore, Newton Abbot.*

Solicitors for defendant: *Church, Rendell, Todd & Co., for Baker, Watts, Alsop & Woollcomber, Newton Abbot.*

(1) 54 L. T. 422.

J. F. C.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES *v.* BISHOP.

1899
May 16.

Revenue—Income Tax—Life Insurance Company—Participating Policy-holders —Return of Premium by way of Bonus—Annual Profits or Gains— 16 & 17 *Vict. c.* 34, *Sched. D.*

A life insurance company had a capital divided into shares, the dividends on which were limited by the articles of association to 7 per cent. The powers of the company were vested in a board of directors elected by the shareholders; the board appointed the officers of the company, and by the officers determined the rates of premium and the terms of insurance, and generally managed the affairs of the company. The company issued participating policies, and by the articles the insurance business was to be conducted on the mutual plan. The earnings and receipts over and above the dividends, losses, and expenses were accumulated from year to year, and every five years a balance was struck and the net surplus in the hands of the company, after deducting an amount sufficient to cover all outstanding risks and obligations, was, in compliance with the articles of association, divided among the holders of participating policies, each policy-holder being credited with an equitable share of such surplus:—

Held, that the surplus returned or credited to the policy-holders was "annual profits or gains," and was assessable to income tax.

Last v. *London Assurance Corporation*, (1885) 10 App. Cas. 438, and *New York Life Insurance Co.* v. *Styles*, (1889) 14 App. Cas. 381, considered.

Case stated under 43 & 44 Vict. c. 19, s. 59, by commissioners for the general purposes of the Income Tax Acts for the City of London, from which the following facts appeared.

The Equitable Life Assurance Society of the United States (called throughout the case the company) appealed against three assessments of 80,000*l.* each made upon them under Sched. D of 16 & 17 Vict. c. 34, for the years ending April 5, 1895, 1896, and 1897 respectively. The company had been established by charter under the insurance laws of the State of New York, and the principal office for the transaction of business was located in the city of New York.

By art. 3 of the charter it was provided (inter alia) as follows: "The capital of the said company shall be 100,000 dollars in cash, divided into shares of 100 dollars each, which

1899

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. BISHOP.

shall be personal property transferable only on the books of the company in conformity with its by-laws. The holders of the said capital stock may receive a semi-annual dividend on the stock so held by them not to exceed 3½ per cent. of the same, such dividends to be paid at the times and in the manner designated by the directors of the said company. The earnings and receipts of the said company over and above the dividends, losses and expenses shall be accumulated."

By art. 4 it was provided that—"The corporate powers of the said company shall be vested in a board of directors and shall be exercised by them and by such officers and agents as they may appoint and from time to time empower."

After appointing by name the persons who should constitute the first board of directors, and who should hold office until their successors were appointed, provision was further made for the filling of vacancies by the remaining directors and for the term of office of the board of directors, also for the time and mode of election of the board, and it was further provided as follows: "In the election of directors every stockholder in the company shall be entitled to one vote for every share of stock held by him, and such vote may be given in person or by proxy. At any time hereafter the board of directors after giving notice at the two previous stated meetings may by a vote of three-fourths of all the directors provide that each life policy holder who shall be insured in not less than 5000 dollars shall be entitled to one vote at the annual election of directors, but such vote shall be given personally and not by proxy."

By art. 5 the board of directors were empowered to elect annually a president and vice-president, and to appoint a secretary and such other officers as they might deem requisite, and power was given to the directors to enact by-laws, rules, and regulations for the government of the officers and agents and for the management of the affairs of the company. The directors were further empowered to determine the rates of premium and the amounts to be insured on any one life and the terms of such insurances.

Art. 6 was as follows: "The insurance business of the company shall be conducted upon the mutual plan. All premiums

shall be payable in cash. In case any policy-holder shall omit to pay any premium due from him to the company or violate any other condition of the policy of insurance the board of directors may forfeit his policy and apply all previous payments to the benefit of the company.

"The officers of the company within sixty days from the expiration of the first five years from December 31, 1859, and within the first sixty days of every subsequent period of five years, shall cause a balance to be struck of the affairs of the company which shall exhibit its assets and liabilities both present and contingent, and also the net surplus after deducting a sufficient amount to cover all outstanding risks and other obligations. Each policy-holder shall be credited with an equitable share of the said surplus. Such equitable share after being ascertained shall be applied to the purchase of an additional amount of insurance (payable at death or with the policy itself) expressing the reversionary value of such equitable share at such interest as the directors may designate, or if any policy-holder so direct such equitable share of surplus shall be applied to the purchase of an annuity at such rate of interest as the directors shall designate to be applied in the reduction of his or her future premiums. In case of death the amount standing to the credit of the party insured at the last preceding striking of balance as aforesaid shall be paid over to the person entitled to receive the same, and the proportion of surplus equitably belonging to him or her at the next subsequent striking of balance shall also be paid when the same shall have been ascertained and declared."

"In case of the death of any party insured prior to passing any period for striking of balance as aforesaid the board of directors may provide what (if any) share of such surplus shall be paid to such person."

"The officers of the company within the first thirty days after the expiration of five years from December 31, 1859, shall cause a general balance statement of the affairs of the company to be made, which shall be open to the inspection of any policy-holder for sixty days during the usual hours of business. Said statement shall shew the amounts received during the preceding

1899

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. BISHOP.

five years for premiums, interest, and annuities, and also the amounts paid during the same time for losses, expenses, and otherwise, and the balance remaining in the treasury, together with the manner in which the same is invested."

A share capital of 100,000 dollars is required to be subscribed by every insurance company, whether a mutual or shareholders' company, by the laws of the State of New York, and this capital is always invested in United States Government bonds (yielding about 4 per cent.), and deposited with the Controller of the State of New York in compliance with the law.

A branch or department of the said company for Great Britain and Ireland had been established, and carried on business at 6, Princes Street, in the City of London, under the management of a London board of directors, with a chairman, secretary, general manager, and trustees.

The power given by the charter under which each policy-holder of $5000 was entitled to vote, but not by proxy, for the election of a director after three-fourths of the directors should agree thereto had not been exercised.

It was admitted that the board of directors alone by their officers managed the affairs of the company; that they decided and declared the amount that should be divided amongst the policy-holders and the amount of the reserve that should be set aside; that the control of the assets and of the investments, the opening of branches, and all other affairs of the company was with them, and that the policy-holders had no power to interfere in the management of the company, except as referred to in the preceding paragraph.

The undivided surplus over and above the company's liabilities under their policies, and calculated on a 4 per cent. actuarial valuation basis, amounted, at the end of 1894, to 7,787,458*l.*, at the end of 1895 to 8,442,502*l.*, and at the end of 1896 to 8,995,245*l.* Policies were also granted by the company to persons without right of participation in the profits of the company. The company, as part of their business in the United Kingdom and in consideration of fixed premiums paid, granted endowment bonds maturing at stated periods, annuities for single lives, joint lives, and deferred and survivorship

annuities; profits arising from the above classes of business were brought into and formed part of the surpluses above mentioned.

The net premiums and interest (*a*) arising from the securities in which the share capital is invested, and (*b*) arising from the general investments of the company after provision for liabilities, including death claims, annuities, maturing endowments, &c., were applied as follows: all expenses and outlays determined by the directors in their discretion were paid, then a reserve as required by the regulations of the insurance department of the State of New York was set aside; then a dividend not exceeding 7 per cent. was paid to the shareholders on their capital; then such sums by way of reserve or surplus reserve were set aside as the directors in their discretion might determine, and the balance, as the directors might determine, was then invested to provide for a division amongst the participating policy-holders of the company by way of bonus on or increase of the amount insured according to such principles and methods as might from time to time be adopted by the society (through the directors) for such distribution.

The company advertised in their prospectus that "no liability attaches to policy-holders."

The contentions on the part of the Inland Revenue on the above facts were, that the company and its assets were not the property of the policy-holders, and that they had no control, power, liability, or right except such as the shareholders by their directors chose to give to them; that the policy-holders were not members of the company, but were third persons who contracted with the company; that the accumulated funds were not the property of the policy-holders, but were accumulated profits; that the company could not properly claim to be a mutual insurance company; that the provisions of art. 6 of the charter, that the business of the company should be conducted upon the mutual plan, could only relate to the division of such portion of the profits as the directors might determine and direct to be divided; that the provision for division of a portion of the profits over and above the fixed dividend payable to the shareholders did not alone make the company a mutual

1899

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. BISHOP.

insurance company, and that the net surplus, so far as the same was derived from premiums received in the United Kingdom, was a profit or gain of the company liable to be assessed to income tax under 16 & 17 Vict. c. 34, Sched. D.

The company cited the case of *New York Life Insurance Co.* v. *Styles* (1), and thereon contended that the premiums paid to the company were contributed as an estimated amount required to cover the risks for the year and the necessary expenses, and that any surplus or balance was not profit or gain liable to assessment, but was merely an excess of contribution over expenditure, which they contended would ultimately be returned to the contributors.

The commissioners of taxes were of opinion that the company was not a mutual insurance company within the meaning of the decision in *New York Life Insurance Co.* v. *Styles* (1), and was liable to be assessed to income tax on profits or gains made in the United Kingdom, and they confirmed the assessments accordingly.

Sir R. T. Reid, Q.C. (*Foote, Q.C.*, and *C. H. L. Neish* with him), for the appellants. This is substantially a mutual insurance company, and income tax is not payable on the surplus premium income returned to the policy-holders. The premiums are so fixed that the company shall incur no risk of loss, and at each quinquennial adjustment so much as is not wanted is in one form or another returned to the policy-holders; that amount is in no sense profits. The test is whether the amount returned is necessarily returned by virtue of the constitution of the company; if that is so, it is not profits, whereas if it were returned by virtue of an arrangement made with the shareholders, or at the discretion of the directors, it would be. In *Last* v. *London Assurance Corporation* (2), where the surplus premium income of a life assurance company was held liable to income tax, the decision of the majority went upon the special facts of the case; but the principle of law is to be collected from the dissenting judgment of Lord Bramwell, and is explained by him in *New York Life Insurance Co.* v.

(1) 14 App. Cas. 381. (2) 10 App. Cas. 438.

1899

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. BISHOP.

Styles (1), where the surplus premium income of a mutual life assurance company was held not liable to income tax. The latter case is in conflict with the former and should be followed. This money is money paid by the company in order to enable it to earn its premium income, and may be said to be in the nature of rebates or discounts required by the constitution of the company to be paid before the profits are ascertained. Any difficulty caused by the existence of a body of shareholders entitled to a dividend on their shares is got over by limiting that dividend to 7 per cent.; that sum is, of course, a profit, and is liable to income tax. *New York Life Insurance Co.* v. *Styles* (1) is a clear decision that the surplus premium income from mutual participating policies is not profits, although the same company may make profits chargeable to income tax on the premium income derived from non-participating policies, and that decision should be followed. (2)

Cripps, Q.C. (*Danckwerts* with him), for the respondent. The decision of the commissioners was right. This is not the case of a mutual insurance company, where the policy-holders themselves form the association; in such a case there would at the end of the year be nothing which could fairly be said to be in the nature of profits. Where, as in the present case, there is a company with a body of shareholders wholly distinct from the policy-holders, the surplus income arising from the premiums is profits in the ordinary sense: it is profits in the hands of, and to be disposed of by, the company. It is immaterial what is done with these profits after they once come into the company's hands: even if they are appropriated by statute to certain purposes, they are none the less liable to income tax: *Mersey Docks* v. *Lucas*. (3) The cases of *Last* v. *London Assurance Corporation* (4) and *New York Life Insurance Co.* v. *Styles* (1) are not in conflict, and the latter is not to be taken as overruling the former; the latter was the

(1) 14 App. Cas. 381.

(2) It was admitted during the argument that the appellants granted non-participating policies, and that upon the profits derived from the premium income of such policies income tax would be payable.

(3) (1883) 8 App. Cas. 891.

(4) 10 App. Cas. 438.

1899

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. BISHOP.

case of a purely mutual insurance company, while in the former the affairs of the company were managed by a board of directors, and the policy-holders were outsiders and were not the association itself. The present case is substantially not distinguishable upon the facts from *Last* v. *London Assurance Corporation* (1), and the decision in that case should be followed.

DARLING J. In this case I think that our judgment must be in favour of the surveyor of taxes. It appears to me that here there was an independent distinct body—the company—independent of and distinct from the policy-holders. Whether that distinguishes this case from *New York Life Insurance Co.* v. *Styles* (2) I will not say as a fact, but to my mind it certainly does distinguish it from the reasoning of the majority of the learned Lords who gave judgment in that case, because over and over again there are such expressions as this of Lord Macnaghten: "I do not think that that decision"—that is, the decision in *Last* v. *London Assurance Corporation* (1)—"compels your Lordships to hold in a case like the present, where the business is a mutual undertaking pure and simple, that persons," and so on. Whether in *New York Life Insurance Co.* v. *Styles* (2) the company really was, as the learned Lords assumed, a mutual undertaking pure and simple, I do not think it can be contended that the present case is that of such an undertaking. It is conceded that in the case of a mutual undertaking pure and simple, where people have merely agreed to insure one another, and have overpaid in the matter of premiums, they can from time to time by some process of readjustment give back to one another in equitable shares what they have overpaid—that is perfectly plain—and what they receive back cannot be called profit and is not assessable to income tax. But the present is a very different case. Here there are two distinct bodies, and being two distinct bodies, the company and the policy-holders, I think the case is governed by *Last* v. *London Assurance Corporation.* (1) It seems to me that what was done here was this: there was a surplus arising

(1) 10 App. Cas. 438. (2) 14 App. Cas. 381.

from payments made by the policy-holders to the company as distinct from the policy-holders themselves, and I think that the surplus was the profits in the hands of the company. It is true that the company having a surplus in its hands chose to pay it back to the policy-holders, or to pay a certain portion of it back, for there is always something accumulating in the hands of the company. Some of this surplus, then, the company paid back to the policy-holders, who were outsiders; but that, I think, did not prevent it from remaining impressed with the character of profit. The fact that a company chooses to pay away its profits in order to extend its business I do not think entitles them to say that they never were profits at all. It has been suggested in argument that, because this was done to attract business, and by virtue of particular contracts, the surplus, even if it had once been profits, could not properly be considered as profits any longer. But it seems to me that that would lead to this kind of argument: that even realized profits in a business, if applied by the owner of the business to its enlargement, could no longer be said to be profits at all, but would then become capital in the business. I cannot assent to that proposition. It seems to me that the surplus became profits in the hands of the company, that what was done with it did not prevent it from being profits, even although it was done by virtue of a prior agreement, and that this case, therefore, is undistinguishable from *Last* v. *London Assurance Corporation*. (1) Whether that case was or was not distinguishable from *New York Life Insurance Co.* v. *Styles* (2), the learned Lords who gave judgment in the latter case do affect to distinguish it, and I must say that it seems to me that the decisions in those two cases are perfectly distinguishable, and that the conclusion to which I have come to-day is consistent with the decision in *Last* v. *London Assurance Corporation* (1), and is certainly within the reasoning of the majority of the House of Lords in *New York Life Insurance Co.* v. *Styles*. (2)

CHANNELL J. I am of the same opinion. I think that we must assume that both the decisions in the House of Lords

(1) 10 App. Cas. 438. (2) 14 App. Cas. 381.

1899

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. BISHOP.

Channell J.

were right, and that there is a real distinction between them. The learned Lords themselves point out what that distinction is, and I cannot help thinking that the judgment which throws most light upon the whole matter is that of Lord Bramwell in *New York Life Insurance Co.* v. *Styles* (1), because he tells us there, he being the dissenting judge in *Last* v. *London Assurance Corporation* (2), what was the principle of that case; he says: "I understand the principle of that decision to be that there was a company making profits, meaning to make profits, not from its own members, but from those it dealt with; that although it returned two-thirds of those profits to those it dealt with, they were not the less profits, and that therefore income tax was payable on them. I thought and still think that wrong. I thought that the profits were only what remained, after the return they had agreed to make, on what was divisible among the shareholders. But whichever opinion is right," and so on. Assuming that to be the principle of the decision in *Last* v. *London Assurance Corporation* (2), it seems to me quite clear that the present case now before us comes within that principle. Here was a body of shareholders, very small in number, it is true, and with very small capital in proportion to the business which they did, but associating themselves for the purpose of carrying on the business of life insurance and carrying it on in this way; they say, "We will limit our profits to 7 per cent. upon the capital which we put into it, and by offering to divide all the profits over 7 per cent. we shall, no doubt, do a very large business, and although we shall never make for ourselves more than 7 per cent., we shall make our 7 per cent. very secure. It will be a portion of a very large income," and so it is in this particular case, "we shall be absolutely secure upon it, and we shall give away all our profits beyond it." Now it might well be said before *Last* v. *London Assurance Corporation* (2), as Lord Bramwell said in that case, that the sums which they had contracted with the people with whom they did business to give back to those persons were business outgoings, and must be taken into account before you arrive at any profit at all. The House of Lords said that was

(1) 14 App. Cas. 381. (2) 10 App. Cas. 438.

not so. It seems to me that the present case comes within the principle of that decision. As to the decision in *New York Life Insurance Co.* v. *Styles* (1), it simply said that where, as was assumed to be the fact in that case, there is nothing but a mutual insurance pure and simple, where parties agree to do business by insuring themselves, and no one else, the sums that they in a certain sense divide amongst each other, not necessarily by taking them in cash, but by adding them to their policies or by altering the proportion which is to be contributed during the next year, are not to be taken on their part to be profits. Assuming that to be a correct statement of the law, the decision does not govern the present case, which comes within the decision in *Last* v. *London Assurance Corporation.* (2) On those grounds, I think that our judgment must be for the Crown.

Appeal dismissed.

Solicitors for appellants: *Neish, Howell & Macfarlane.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

W. J. B.

JEFFREY *v.* WEAVER.

1899
June 15.

Licensing Acts—Offences—Keeping Open during Prohibited Hours—Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *s.* 9.

In order to constitute the offence of opening or keeping open licensed premises for the sale of intoxicating liquor during prohibited hours, within the meaning of s. 9 of the Licensing Act, 1874, there must be means of access to customers to the interior of the premises from the outside. If therefore the outer doors are closed at the closing hour, so as to prevent access from the outside, the offence of keeping open the premises during prohibited hours is not proved by evidence that customers, who were on the premises before closing time, remained there and were supplied with liquor afterwards, although such evidence might justify a conviction under the same section for selling intoxicating liquor during prohibited hours.

CASE stated by justices for the county of Worcester.

An information had been preferred by the appellant against the respondent under s. 9 of the Licensing Act, 1874, charging

(1) 14 App. Cas. 381. (2) 10 App. Cas. 438.

1899

JEFFREY v. WEAVER.

that the respondent, being a licensed person for the sale of intoxicating liquors by retail, did unlawfully keep open his licensed premises for the sale of intoxicating liquor during part of the time that they were required by the Licensing Act, 1874, to be closed, to wit, 11.30 o'clock at night. The facts proved or admitted at the hearing were as follows:—

On February 21, 1899, John Howard, a police sergeant, saw a man named Harford go into the respondent's licensed premises, the Sampson Inn, Bromsgrove, at about 10 o'clock at night, and at 10.30 P.M. as he passed the premises he heard Harford and a man named Dufty talking in the bar; at 11.25 the same night he was again passing and heard voices in the bar, which, on listening, he recognised as the voices of Harford and Dufty; the house was required to be closed at 11 o'clock. Howard then tried the front and back doors, and found both locked. He then heard the passage in the house being swilled; this was the custom of the house nearly every night, and for this purpose the front door was opened; when the front door was opened by the man who was doing the swilling, Howard walked in and went into the bar, where he found the respondent's wife and daughter and Harford and Dufty, the respondent's wife being in the act of handing glasses of whisky and soda to Harford and Dufty. In reply to the constable the wife said that they were friends, and the daughter said, "Oh, they are stopping here to-night; they have taken beds." It was admitted that Dufty also went to the house before 10 o'clock that night, and that both the men had been supplied with intoxicating liquor as ordinary customers between 10 and 11 o'clock, and they had stayed on after closing time upon the invitation of the respondent's wife, who was entrusted by the respondent with the management of the inn. It was also admitted that the opening of the front door by the man for swilling the passage was usually done most nights. At 1.25 A.M. the respondent's wife opened the front door of the inn, and after looking up and down the street shut the door and locked it, and at 1.30 A.M. the back door leading out of the yard of the inn into the narrow lane or passage was opened, and the two men Harford and Dufty came out and ran down the lane or

passage. Howard then went into the inn by the back door, which was open, and saw the respondent, and called his attention to the fact of the two men having just left by the back door, to which the respondent replied, "I can't help it; it is my wife's fault."

On the part of the respondent it was contended that there was no evidence of keeping open for sale.

The justices, being of opinion that they were bound by the decisions in *Tennant* v. *Cumberland* (1) and *Jefferson* v. *Richardson* (2), and that to establish a charge of keeping open there must be evidence that the outer door was either open or ajar, or that some one was ready to open it when tapped at or other notice given by a customer, and that in this case it was admitted by the appellant that both outer doors were locked up to 11.25 P.M., dismissed the summons on the ground that there was no evidence of keeping open, without calling for any evidence on the part of the respondent.

The question for the Court was whether there was any evidence of keeping open for the sale of intoxicating liquors, and whether they were right in law in dismissing the summons. (3)

Amphlett, Q.C. (*Sidney Clarke* with him), for the appellant. There was ample evidence that the respondent kept his premises open for the sale of intoxicating liquor during closing hours within the meaning of s. 9 of the Licensing Act, 1874. The cases cited by the justices do not bear out the contention that in order to justify a conviction under that section the outer door must be open.

[He was stopped by the Court.]

J. B. Matthews, for the respondent. The decision of the

(1) (1859) 1 E. & E. 401.

(2) (1871) 35 J. P. 470.

(3) By s. 9 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), "Any person who, during the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this Act, sells or exposes for sale in such premises any intoxicating liquor, or opens or keeps open such premises for the sale of intoxicating liquors, or allows any intoxicating liquors although purchased before the hours of closing to be consumed in such premises," is made liable to a penalty.

1899

JEFFREY v. WEAVER.

justices was right. Sect. 9 of the Licensing Act, 1874, deals with two offences, which must be kept distinct: the sale of intoxicating liquors during prohibited hours, and the keeping open the premises for sale during such hours: per Crompton J. in *Tennant* v. *Cumberland* (1), which was decided on similar words in 11 & 12 Vict. c. 49, s. 1. The respondent might have been convicted of selling during prohibited hours, but a charge under such circumstances as the present of keeping the premises open for sale involves the argument that keeping a house shut is keeping it open. There were no means of ingress after the hour of closing, nor did any one enter the house after that hour; the two doors were only opened for the purpose of cleaning the passage and of letting out the men who had been in the house. If after the hour of closing men are found on licensed premises who were not there before that hour, there is some evidence of keeping open during prohibited hours; and the facts may raise an irresistible inference that the customers went in during prohibited hours, and that the house was kept open for them, as in *Finch* v. *Blundell.* (2) In most cases where a conviction for keeping open has been sustained, the door has been kept partly open, as in *Thompson* v. *Greig* (3); it is not sufficient to support such a charge that men are seen to come out of a side door, if the front door is shut and there is no evidence of a sale during prohibited hours: *Jefferson* v. *Richardson.* (4) [He also cited *Brewer* v. *Shepherd.* (5)]

Amphlett, Q.C., in reply. The evidence was ample to warrant a conviction. If customers are allowed to remain on licensed premises after the closing hours and are supplied with liquor, the premises must be taken to have been in the first place opened and afterwards kept open for the sale of liquor to them. The closing must be a real one; it must not be a sham: per Mellor J. in *Brigden* v. *Heighes* (6); here the closing was merely a colourable compliance with the Act of Parliament. [He also cited *Cates* v. *South.* (7)]

(1) 1 E. & E. 401.
(2) (1862) 5 L. T. (N.S.) 672.
(3) (1869) 34 J. P. 214.
(4) 35 J. P. 470.
(5) (1872) 36 J. P. 373.
(6) (1876) 1 Q. B. D. 330.
(7) (1859) 1 L. T. (N.S.) 365.

1899

JEFFREY v. WEAVER.

GRANTHAM J. This case raises a question of some difficulty; but, upon the whole, I am of opinion that the words "open or keep open" must bear the interpretation that would be placed upon them in ordinary parlance, and that to bring a case within the purview of this section the premises must be opened or kept open for people to come in; that it is not sufficient, if all that is shewn is that people are inside the premises at prohibited hours in order to be served with intoxicating liquor; the latter is a distinct offence. It is clear that, if people are in a licensed house during closing hours and are served with liquor, it is contrary to law; there must be some evidence that they are there for that purpose, and in all the cases that have been cited to us the decision of the judges of this Court has gone very strictly upon the evidence in the particular case. In the present case the evidence shews that there were people in the house who were there before closing time and remained there after that time; it is clear also that the house was closed in the ordinary sense of the word, both the front and back doors being locked; they were both tried, but the police could not get in at either door. Indeed, the police would have known nothing about affairs inside the house, but for the fact that the floor was swilled in the ordinary course, and that the door was opened in order to let out the water. Then they entered, and found the two men with drink before them; they were stated to be friends of the landlady, and there is evidence that they were invited by her to stay beyond the closing time; there is, therefore, some evidence that no breach of the law had been committed. Taking all the facts of the case, I think that these premises were not open in the sense of being open for the purpose of letting in people from the outside; and that it is the safer course to take the narrower view of the meaning of the words "open or keep open"; and that, unless the outer door is left open or ajar in order that people may come in, we ought not, the outer door being shut and fastened, to hold that the house is kept open for the sale of intoxicating liquors merely because there are people inside. I think, therefore, that we should uphold the decision of the justices.

1899

JEFFREY v. WEAVER.

BRUCE J. I am of the same opinion. The evidence shews that both the doors of this house were closed except upon two occasions: one of those occasions was when a door was opened in order to get rid of the water after swilling the floor; that was certainly not an opening for the purpose of selling intoxicating liquor. The second occasion was when the back door was opened and the two men ran away; and that, again, was clearly not for the sale of intoxicating liquor. It has been suggested that the premises are open within the meaning of the section if there are persons drinking in the premises, although there is no mode of access from the outside. I do not agree with that contention. In my opinion if the doors are really closed so that a person outside could not come in, the premises are not open within the meaning of s. 9 of the Licensing Act, 1874. It is really a question of means of access to the interior of the premises from the outside, and if there are no such means of access then the premises are not open or kept open within that section.

Judgment for the respondent.

Solicitors for appellant: *Clarke & Blundell, for Thornely, Worcester.*

Solicitors for respondent: *Thomas White & Sons, for Holyoake, Bromsgrove.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1899
July 28.

THE QUEEN ON THE PROSECUTION OF WILLIAM BAMBER AND OTHERS *v.* NICHOLSON AND OTHERS, LICENSING JUSTICES OF THE BOROUGH OF BOLTON.

Licensing Acts—Licence—Premises taken for Public Purpose—Application for Licence in respect of other Premises—Notice—Sufficiency—Justices proceeding on Insufficient Notice—Mandamus to Hear and Determine—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beer House Act*, 1869 (32 *&* 33 *Vict. c.* 27), *s.* 7—*Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 40.

The holder of a licence in respect of a house about to be pulled down for a public purpose gave the notices required by s. 14 of the Alehouse Act, 1828, of his intention to apply for a licence in respect of another house not then licensed. The notices given did not comply with the provisions of s. 40 of the Licensing Act, 1872. The licensing justices at a special session granted the application upon information that the notices were in order. A rule nisi having been obtained for a writ of mandamus to the justices to hear and determine the application according to law:—

Held, by a Divisional Court, that the notices were not in order, and that the justices had acted without jurisdiction, but that, as they had heard and determined the application, a mandamus ought not to issue:

Held, by the Court of Appeal, that the notices were good, as the specific provisions with regard to them in s. 14 of the Alehouse Act, 1828, had not been expressly or impliedly repealed by s. 40 of the Licensing Act, 1872.

THIS was a rule, obtained on behalf of William Bamber and others, for a mandamus to the justices of the county borough of Bolton to hear and determine according to law an application for a licence to sell intoxicating liquors at premises known as Halliwell Lodge.

The following facts appeared from the affidavits filed in support of, and in opposition to, the rule: At a special session of the Bolton borough justices, held on January 26, 1899, James Paisley applied, under s. 14 of the Alehouse Act, 1828, for a licence to sell by retail all intoxicating liquors to be consumed either off or on the premises at a house known as Halliwell Lodge, situate in the borough, the application being made in consequence of a house known as the Rope and

C. A. 1899

REG. v. NICHOLSON.

Anchor, in respect of which James Paisley then held a similar licence, being about to be pulled down for the improvement of certain highways in the borough. The justices heard the application and the evidence adduced in support of it; and they received as part of such evidence a statement that the several notices and requirements provided by the Alehouse Act, 1828, had been given, published, and complied with. The application was not opposed; and there was no objection taken by any one as to the sufficiency of the notices. The justices granted the application.

On January 18, 1899, notice in writing, on behalf of James Paisley, had been given to the chief constable and to the overseers of the poor of the borough of Bolton of Paisley's intention to make the above application. On Sunday, January 22, from 1 A.M. till 5 P.M., a similar notice was placed on the front door of Halliwell Lodge and on the front door of the Bolton parish church.

This rule was obtained, on March 3, by the above-named persons, residents in the neighbourhood of Halliwell Lodge, who said that they had no knowledge of the application for a licence for that house until after it had been granted, in consequence of the proper notices in the case of an application for the removal of a licence under s. 14 of the Alehouse Act, 1828 (1), not having been given under s. 7 of the Wine and

(1) 9 Geo. 4, c. 61, s. 14: "... If any house, being kept as an inn by any person duly licensed as aforesaid, shall be or be about to be pulled down or occupied under the provisions of any Act for the improvement of the highways or for any other public purpose ... it shall be lawful for the justices assembled as aforesaid at a special session, holden under the authority of this Act, for the division or place in which the house so kept or having been kept shall be situate, ... to grant to the person whose house shall as aforesaid have been or shall be about to be pulled down or occupied for the improvement of the highways, or for any other public purpose, ... and who shall open and keep as an inn some other fit and convenient house, a licence to sell exciseable liquors by retail, to be drunk or consumed therein: Provided always, that every such licence shall continue in force only from the day on which it shall be granted until the 5th day of April, or the 10th day of October then next ensuing, as the case may be: Provided also, that every person intending to apply in any of the above-mentioned cases, at any such special session for a licence to sell exciseable liquors by retail, to be drunk or consumed in a house or

Beerhouse Act, 1869 (1), and s. 40, sub-s. 1, of the Licensing Act, 1872 (2); and that, if such notices had been given, they would have appeared and opposed the application.

premises thereunto belonging, in which exciseable liquors shall not have been sold by retail, to be drunk or consumed on the premises, by virtue of a licence granted at the general annual licensing meeting next before such special session, shall, on some one Sunday within the six weeks next before such special session, at some time between the hours of ten in the forenoon and of four in the afternoon, affix or cause to be affixed on the door of such house, and on the door of the church or chapel of the parish or place in which such house shall be situate, and where there shall be no church or chapel, on some other public and conspicuous place within such parish or place, such and the like notice as is hereinbefore directed to be affixed by every person intending to apply at the general annual licensing meeting for a licence to sell exciseable liquors by retail, to be drunk or consumed in a house not theretofore kept as an inn, and shall in like manner serve copies of the said notice on one of the overseers of the poor, and on one of the constables or other peace officers of such parish or place."

(1) 32 & 33 Vict. c. 27, s. 7: "Every person intending to apply to the justices for a certificate under this Act shall, twenty-one days at least before he applies, give notice in writing of his intention to one of the overseers of the parish, township, or place in which the house or shop in respect of which his application is to be made is situate, and to some constable or peace officer acting within such parish, township, or place, and shall in such notice set forth his name and address, and a description of the licence or licences for which he intends to apply, and of the situation of the house or shop in respect of which the application is to be made; and in the case of a house or shop not theretofore licensed for the sale by retail of beer, cider, or wine, such person shall also within the space of twenty-eight days before such application is made cause a like notice to be affixed and maintained between the hours of ten in the morning and five in the afternoon of two consecutive Sundays on the door of such house or shop, and on the principal door or on one of the doors of the church or chapel of the parish or place in which such house or shop is situate, or, if there be no such church or chapel, on some other public and conspicuous place within such parish or place."

(2) 35 & 36 Vict. c. 94, s. 40: "Every person intending to apply for a new licence, or to apply for the transfer of a licence, shall publish notice of such application as follows; that is to say,

"(1.) In the case of a new licence, he shall cause notice thereof to be given and to be affixed and maintained in manner directed by section seven of 'The Wine and Beerhouse Act, 1869,' and any enactment amending the same, and shall advertise such notice in some paper circulating in the place in which the premises to which the notice relates are situate, on some day not more than four and not less than two weeks before the proposed application, and on such day or days, if any, as may be from

C. A. 1899

REG. v. NICHOLSON.

May 9. *Sir Edward Clarke, Q.C.* (*C. W. Mathews* and *Guy Stephenson* with him), shewed cause. On the question of notices, the notices required by s. 14 of the Alehouse Act, 1828, were properly given. The provisions of sub-s. 1 of s. 40 of the Licensing Act, 1872, as to the notices to be given "in the case of a new licence" do not apply, because this was not an application for a "new licence," but for the transfer of an existing licence. By s. 74 of the Licensing Act, 1872, a new licence is defined as "a licence granted at a general annual licensing meeting in respect of premises not theretofore licensed for the sale of intoxicating liquors," and the definition of "new licence" given in s. 32 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), is in somewhat similar terms. The application for, and grant of, a transfer in the present case were made at special transfer sessions, not at the general annual licensing meeting. If s. 40 of the Licensing Act, 1872, applies at all, the only part of it which applies is sub-s. 2; and, that being so, the only defect in the notices was that the applicant for a transfer gave a nine, instead of a fourteen, days' notice; but that would not affect the objectors here.

Next, if the notices were wrong, the objectors' remedy is not by mandamus. But for the decision in *Reg.* v. *Sharman* (1) the proper remedy would have been by certiorari. It does not follow that, because certiorari is not the proper remedy, mandamus is. The justices assert that they have heard and

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time to time fixed by the licensing justices:

"(2.) In the case of the transfer of a licence he shall, fourteen days prior to one of the special sessions appointed by the justices for granting transfers of such licences, serve a notice of his intention to transfer the same upon one of the overseers of the parish, township, or place in which the premises in respect of which his application is to be made are situate, and on the superintendent of police of the district. This notice shall be signed by the applicant or by his authorized agent, and shall set forth the name of the person to whom it is intended that such licence shall be transferred, together with the place of his residence, and his trade or calling during the six months preceding the time of serving such notice: . . . .

"The provisions of this section as to notices shall extend to all cases where, under the Intoxicating Liquors Act, 1828," i.e., the Alehouse Act, 1828, "notices are required to be served in a like form to or in the same manner as notices for new licences."

(1) [1898] 1 Q. B. 578.

determined both the question of notices and the application generally, so that if a mandamus went it would be useless: *Reg.* v. *Pirehill Justices.* (1) A mandamus will not go merely because the justices have decided wrongly on matters within their jurisdiction: *Reg.* v. *Cotham* (2), per Wills J.; see per Channell J. in *Reg.* v. *Manchester Justices.* (3) Here the justices have not refused to hear and determine, or entertained and acted upon extraneous matters not within their jurisdiction; they have only decided wrongly on the question of notices, which question was within their jurisdiction, and in respect of which they had evidence before them.

There was an unreasonable delay in applying for the mandamus, and on that ground this rule should be discharged.

Horace Avory (*Llewellyn Williams* with him) supported the rule. First, as to the notices, s. 10 of the Alehouse Act, 1828, made provision for the notices to be given in the case of an application for a new licence, and s. 11 dealt with the notice to be given in the case of a transfer. The proviso at the end of s. 14 requires that wherever there is an application under the section for a licence in respect of an unlicensed house the same notices should be given as were required under s. 10 to be given by persons intending to apply at the general annual licensing meeting for a licence in respect of premises not theretofore kept as an inn. Sects. 10 and 11 are repealed by the Licensing Act, 1872, and s. 40 of that Act takes their place. The provisions of sub-s. 1 of s. 40 should have been complied with here, and notices should have been given under that sub-section and s. 7 of the Wine and Beerhouse Act, 1869, which it incorporates. Sub-s. 2 of s. 40 of the Licensing Act, 1872, does not apply; it applies only to transfers from one person to another, and provides that the notice must state the name of the transferee. The definition of "the transfer of a licence" in s. 74 of the Act of 1872 is "a transfer made in special sessions in exercise of the power granted to justices by the 4th section of 9 Geo. 4, c. 61." The application here was under the 14th, not under the 4th section. It was an

(1) (1885) 49 J. P. 453. (2) [1898] 1 Q. B. 802, at p. 806.
(3) [1899] 1 Q. B. 571, at p. 576.

C. A. 1899

REG. v. NICHOLSON.

application for the removal of a licence, and by s. 50 of the Act of 1872 notice of an intended application for a removal must be given in the same manner as notice is given of an application for the grant of a new licence. Admitting that this was not an application for the grant of a "new licence" within the definition of that expression in the Act of 1872, it must be treated as a new licence for the purposes of notice. If sub-s. 2 of s. 40 of the Act of 1872 did apply here, its provisions were not complied with. The notices were, therefore, bad.

Secondly, a mandamus is a proper remedy in this case, and is now the only remedy. The result of there having been no advertisements as provided by the statute is that persons who would have opposed the application have been shut out from a hearing. There has been no hearing according to law, because the conditions precedent to the jurisdiction of the justices have not been complied with. The justices cannot give themselves jurisdiction by disregarding the statutory provisions. A hearing of one side only, in consequence of no notice of the application having been given to those who were entitled to oppose it, cannot be a hearing according to law. In *Reg.* v. *De Rutzen* (1) Blackburn J. said, in answer to the argument that a mandamus would not lie in that case: "Assuming that residence is not required, then the justices have not determined according to law."

DARLING J. In this case, in which we are asked to make absolute a rule for a mandamus to justices to hear and determine an application for a licence under 9 Geo. 4, c. 61, s. 14, I have come to the conclusion that we cannot make it absolute; but I desire to say that I have come to that conclusion with very great difficulty and with considerable regret, because the result is that there is no remedy for a state of circumstances which appears to require one.

I think that we may take it that the same notices were required in this case as in the case of an application for a new licence. The notices here, therefore, were entirely wrong, for one reason, because, in the case of a new licence, notice of the

(1) (1875) 1 Q. B. D. 55, at p. 57.

application must be advertised in some paper circulating in the place, and there was in this case no such advertisement. When the application came before the justices, they asked whether the notices were in order, and were told that they were. That was wrong, but no one contradicted the statement; and the justices proceeded to hear and adjudicate upon the case.

It is said that the mandamus should go, because they did not hear and determine the case according to law. I think that, as regards the liability to a mandamus, there is a distinction between not hearing according to law and not determining according to law. I think that they are bound to hear according to law; but I do not think that a mandamus could go because they had not determined according to law. If they were bound to determine rightly according to law, it would be open to the parties to apply for a mandamus in every case of a wrong decision in point of law by justices. A mandamus was never supposed to be and never was a remedy of that kind. Some expression that is reported to have been used in the case of *Reg.* v. *De Rutzen* (1) was relied on in the argument in support of the rule; but I think that there must have been some mistake about that. It is an observation made by Blackburn J. in the course of the argument. Counsel were arguing that "if the justices were wrong, still they have heard and determined the application, and to grant a mandamus would be in effect to command them to determine in a particular way—that is, by granting a certificate—which is what the practice of the Court does not permit." And Blackburn J. then says: "Assuming that residence is not required, then the justices have not determined according to law." The Court in that case issued a mandamus; but I think that what Blackburn J. must really have said was that the justices had not heard according to law. They had not heard according to law in that case in this sense, that they had wrongly held that residence on the licensed premises was a qualification required by law in the applicant. Practically

(1) 1 Q. B. D. 55.

C. A. 1899

REG. v. NICHOLSON.

Darling J.

they refused to hear a person who asked to be heard, and upon a ground on which they were not entitled to refuse to hear him.

In this case there has been no refusal to hear on the part of the justices. It may be that their determination was not according to law. But are we to say that the whole hearing was, therefore, a nullity? I do not see how we can say that. Suppose that some one had contended before the justices that the notices were not in order, and, notwithstanding that contention, they had held that they were in order. Could it then be said that, because this Court differed from the view of the justices and thought that the notices were bad, we could hold that the justices had not heard according to law? All that could be said in that case would be that they had not determined according to law a question which they had to determine. I think that that is equally so in the circumstances of this case, because the notices would have been just as bad in that case as they are in this, and the arguments founded on that defect in the proceedings would have been just as applicable. The writ of mandamus is not to be a means of appeal wherever the magistrates come to a wrong conclusion as to whether notices are good or not. Short of deciding that, I cannot see how we can allow the writ to go in the present case.

Down till quite lately there would have been a remedy, under the circumstances of the present case, by means of the writ of certiorari. That remedy was thought to be applicable to such a state of facts until the case of *Boulter* v. *Kent Justices* (1), which decided that licensing justices were not a court. Shortly after that, the case of *Reg.* v. *Sharman* (2) came before Wright J. and myself, in which we held that certiorari would not lie to licensing justices because they were not a court. If that decision was right, and if we are right in holding that there can be no mandamus, there is now no remedy in a case of this kind. I regret that it should have fallen to my lot to be a party to both decisions. I cannot say that I think that I was wrong in holding as I did in *Reg.* v.

(1) [1897] A. C. 556. (2) [1898] 1 Q. B. 578.

Sharman (1), although I should not be sorry to see it held that I was wrong. I do not think, however, that we should be justified in holding that, because one remedy has been held not to afford relief, the other remedy must apply.

CHANNELL J. I am of the same opinion. The first question that we have to decide is whether these notices were good or bad. I think that they were bad. The application to the licensing justices was for a special kind of transfer—not a transfer from one person to another person who was going to carry on business at the same licensed premises, but a transfer of the licence of a house about to be pulled down to a new set of premises. In some sections of the Licensing Acts that appears to be called a transfer, and in others not; but whether it is called a transfer or a licence, it is to be granted at the special sessions, not at the general annual licensing meeting. The application was made under s. 14 of the Alehouse Act, 1828; and, at the end of that section, there is a proviso which says that in such a case certain notices shall be given. These notices are different to those provided for in s. 11 in the case of the transfer of a licence. They are to be "such and the like notice as is hereinbefore directed to be affixed by every person intending to apply at the general annual licensing meeting for a licence to sell exciseable liquors by retail, to be drunk or consumed in a house not theretofore kept as an inn." So that that made it necessary to give the like notice as had to be given, under s. 10, in the case of an application for a licence to keep a house as an inn not previously kept as such; that is to say, it would be the same form of notice, but, by reason of a special provision in s. 14, it would only have to be affixed to the door of the church or other public place on some one Sunday instead of on three Sundays. The special matter in s. 14 would apply, but in other respects the notice would have to be as in the case of an application under s. 10. Then ss. 10 and 11 are repealed by the Licensing Act, 1872, and s. 40 of that Act is substituted for them. That section says that, "Every person intending to apply for a new licence, or to apply for the transfer of a licence,

(1) [1898] 1 Q. B. 578.

C. A. 1899

REG. v. NICHOLSON.

Channell J.

shall publish notice of such application as follows"; and then sub-s. 1 sets out the notice to be given in the case of a new licence, and sub-s. 2, in the case of the transfer of a licence. At the end of the section there are these words: "The provisions of this section as to notices shall extend to all cases where, under the Intoxicating Liquors Act, 1828, notices are required to be served in a like form to or in the same manner as notices for new licences." Now, the words that I have read from s. 14 of the Act of 1828 shew that, where it is intended to apply for the transfer of a licence from a house that is to be pulled down to a house not then licensed, such and the like notices are required as in the case of a person applying for a new licence. Therefore, some of the provisions of s. 40 as to notices apply to this case; and the only question is whether the provisions of sub-s. 1, in the case of a new licence, or of sub-s. 2, in the case of the transfer of a licence, are applicable. I am of opinion that the provisions of sub-s. 1 as to notice in the case of a new licence are those that apply to this case; and, if so, it is quite clear that the notices in this case were not correct.

I have had no great difficulty in coming to that conclusion with regard to the notices; the other question, as to whether there is here a remedy by mandamus, is a more doubtful one. I have, however, reluctantly come to the conclusion that we cannot grant the mandamus. I think that a mandamus cannot go, under the circumstances of this case, without infringing principles that it is not desirable to infringe, however inconvenient their application may be in the particular case.

Where certain specified notices have to be given before an application can be heard, it is necessary, upon the application coming on for hearing, to inquire in the first place into the facts as to the notices in order to ascertain whether the tribunal has jurisdiction to entertain it. The justices in this case did make that inquiry. They were told that the proper notices had been given. Probably in such a case the justices would rely to a great extent on their clerk. But however that may be, they did come to the conclusion that the proper notices

had been given when in fact they had not been. As I have said, it was their first duty to consider that question. They did consider it, and came to a wrong conclusion. If this had been a case in which they had jurisdiction and had come to the wrong conclusion that they had not, and had consequently refused to hear the application, the mandamus could have gone. That would have been a refusal on their part to hear and determine. But that is not the case before us. They did here enter upon the question whether they had jurisdiction, and wrongly decided that they had. They cannot give themselves jurisdiction by an erroneous decision of a preliminary question, but the result of their decision was that they proceeded to act without jurisdiction. The question is, What is the remedy for that, if there be a remedy? If it was a judicial act, the proper remedy is certiorari: that is the remedy for acts done in excess of jurisdiction. If certiorari lies in this case, no mandamus is wanted. No one would have thought in such a case as this of applying for a mandamus, if it had not been for the recent decisions as to licensing justices not being a court. It seems to me that we must dispose of the question of mandamus just as we should have done if this had been a judicial act. I cannot see my way to dispose of it any differently because certiorari will not lie.

It is argued that there was no hearing by the justices here; that what purported to be a hearing was a nullity. I cannot say that the hearing of this application was a nullity, so that the licence granted at it was altogether void. Then, if the licence that has been granted was not a nullity, the proper thing to do in the first place is to take steps to have it set aside. In this proceeding we clearly have no power to set the licence aside; nor can we do anything but require the justices to hear and determine an application for a licence which they have already granted. Undoubtedly, if the Court could come to the conclusion that what purported to be the hearing was no hearing at all, in that case the mandamus could go. Thus, a mandamus has been granted in cases where a tribunal, instead of considering the application before them and the grounds of it, have taken into consideration matters altogether extraneous

C. A. 1899

REG. v. NICHOLSON.

Channell J.

to that which was really before them. For instance, where a licence was practically put up to auction by annexing as a condition to the grant of it a money payment, it was held that the justices had allowed their decision to be influenced by extraneous considerations, and that the hearing was equivalent to no hearing at all: *Reg.* v. *Bowman.* (1) The case of *Reg.* v. *Cotham* (2) also ranges itself under the same head; because there Wills J. says: "We have next to consider whether the case is one in which a mandamus ought to be granted directing the justices to hear and determine the matter according to law. It is obvious that the distinction between an erroneous decision and a failure to hear and determine according to law may be very fine, and the cases on the subject shew that it is so. I take the governing principle to be that if the justices have applied themselves to the consideration of a section of an Act of Parliament, and have, no matter how erroneously, determined the question which arises upon it before them, their decision cannot be reviewed by process of mandamus." That is exactly what I think, and what I am deciding in this case. Then he goes on: "That is so, whether there is an appeal from their decision or not. If there is an appeal, mandamus will not lie; if there is not, their decision is final. But when it appears that they have taken into consideration matters which are absolutely outside the ambit of their jurisdiction, and absolutely apart from the matters which by law ought to be taken into consideration, then they have not heard and determined according to law." In that case the Court came to the conclusion that the magistrates must have taken into consideration some extraneous matters. It is quite immaterial whether the Court were right or not in fact in coming to that conclusion. They proceeded on the assumption that the justices had known the true facts, and had gone outside them and considered matters extraneous to the question which they had to decide.

In this case we cannot say that the magistrates have taken into consideration any extraneous fact. As I have said, they were correct in their proceedings. They considered whether

(1) [1898] 1 Q. B. 663. (2) [1898] 1 Q. B. 802.

the right notices had been given, and came to the conclusion erroneously that they had. That was the first thing they had to do. It is said that if the proper notices had been given, other persons would have been present, and would have opposed the application. No one, however, did appear to oppose, and none, therefore, has been refused a hearing. It would not have been open to those persons, if the justices had been right in their decision as to the notices, to come and ask this Court to order a rehearing because they had not heard of the proposed application; and the fact that the justices were wrong in their decision does not give them that right. It is unfortunate that the effect of the decision should be that persons who might otherwise have been present were not so; but that is not a refusal to hear them. It cannot be said that the justices have not exercised jurisdiction. They have done an act which is beyond their jurisdiction, and which we have no power to set aside. Probably, the Legislature may shortly give us that power. The fact that licensing justices are not a judicial body need not in any way prevent Parliament from expressly enacting that certiorari should lie to that tribunal, as, indeed, it has done in other cases.

As to whether certiorari will lie or not to licensing justices, there is the decision in *Reg.* v. *Sharman* (1) that it will not. The House of Lords have had the question before them, but have not decided it: *Laceby* v. *Lacon & Co.* (2) It may be that, although licensing justices are not a court, certiorari does nevertheless lie in cases of this description. If it should be finally decided that certiorari does not lie, I cannot doubt but that the Legislature will interpose and provide some remedy in such cases, which certainly ought not to be without one.

I will only add that if we directed that the mandamus should go in this case, and the justices were to make a return that they had heard and determined, I think that we should be placed in a position of some difficulty.

Rule discharged.

W. A.

The prosecutors appealed.

(1) [1898] 1 Q. B. 578.

(2) [1899] A. C. 222.

C. A. 1899

REG. v. NICHOLSON.

May 17. An application was made to the same Divisional Court for a rule nisi for a writ of certiorari to bring up the licence granted by the justices on January 26. The application was refused on the authority of *Reg.* v. *Sharman.* (1) On May 30 a similar application was made to the Court of Appeal, and a rule nisi was granted. The argument as to the rule nisi for a certiorari being made absolute and the appeal from the refusal of the writ of mandamus by the Divisional Court came before the Court of Appeal together.

July 28. *Avory* and *Llewellyn Williams*, for the prosecutors, argued, as in the Court below, that s. 40 of the Licensing Act, 1872, applied, and that the notices were bad, and that the justices had proceeded without jurisdiction. They contended that certiorari would lie under these circumstances, and that if the licence granted to the applicant was not in the possession of the justices the form of the writ might be moulded so as to bring up the record of the granting of the licence in the register of licences.

Sir E. Clarke, Q.C. (*C. W. Mathews* and *Guy Stephenson* with him), for the defendants. The notices given were sufficient, as s. 14 of the Alehouse Act, 1828, dealt, not with new licences or transfers, but with protective or emergency licences. For that purpose there are regulations as to what notices shall be given and as to how they are to be published, and the reference to s. 10 only refers to the form of the notices, and, consequently, s. 40 of the Licensing Act, 1872, leaves the special provisions of s. 14 of the Alehouse Act, 1828, in full force. There is no direct repeal of those provisions, and none can be implied.

Even if a writ of certiorari can be granted in such a case as the present, the issue of the writ is discretionary, and the prosecutors have not shewn that, by reason of their local situation, they are aggrieved. Further, the delay in applying to the Court is a reason why the Court will not in the exercise of its discretion grant a certiorari.

Avory, in reply.

(1) [1898] 1 Q. B. 578.

C. A. 1899

REG. v. NICHOLSON.

A. L. SMITH L.J. The application that I have to deal with arises on the refusal of a Divisional Court to grant a rule for a certiorari, for which a rule nisi was afterwards granted by this Court. There is also an appeal from an order of the same Divisional Court discharging a rule nisi for a mandamus.

I will first deal with the question whether on the application for what has been called an emergency licence the proper notices were given. The applicant was moving from a public-house called the Rope and Anchor, in the borough of Bolton, which house was about to be pulled down for the improvement of certain highways in the borough, and he applied for a licence in respect of certain premises known as Halliwell Lodge. The legislation with which we have to deal is intricate, and it is made so principally by the introduction of provisoes in subsequent legislation. We have to consider s. 14 of the Alehouse Act, 1828, which contains special legislation as to cases in which public-houses are pulled down for a public purpose. The section deals with the death or sickness of a person duly licensed under the Act, and with several other matters happening before the expiration of the licence, and, among others, this case of a house pulled down for a public purpose, and it gives the man whose old premises are pulled down the right to ask for a licence, which will expire on the next 10th of October, to carry on business somewhere else. There is a proviso with regard to the notices which are to be given to the special sessions for a licence to sell exciseable liquors by retail in a house to which no licence is already attached, as in the present case. The provision is that on some one Sunday within the six weeks before the special sessions notice is to be affixed to the door of the house, and the door of the church or chapel of the parish or place in which the house is situate, and, where there is no church or chapel, on some other conspicuous place within such parish or place. That, in my judgment, regulates the manner in which the notice is to be given. The form of notice is regulated by the second part of the proviso, which describes it as "such and the like notice as is hereinbefore"—that is by s. 10—"directed to be affixed by every person intending to apply at the general annual licensing meeting for a licence." If the

C. A. 1899

REG. v. NICHOLSON.

A. L. Smith L.J.

matter stopped there, no difficulty would arise, because everything was done to satisfy the requirements of the section; but it is said that the notices given do not comply with s. 40 of the Licensing Act, 1872, which, it is argued, repeals the manner of giving notices under s. 14 of the Act of 1828. I may say that Act seems to me to have been passed alio intuitu, and not to have been directed to what have been termed emergency cases. The section does not profess to deal with those cases: it says, "every person intending to apply for a new licence, or to apply for the transfer of a licence," shall publish notice of his application in a certain way. That does not touch an emergency case, because, as has been pointed out, such a case is not included in the definitions of "a new licence" and "the transfer of a licence" given in s. 74 of the Act. If the section had stopped short of the proviso there would have been no ground for saying that it applied to the present case. But then comes a proviso the concluding part of which is: "The provisions of this section as to notices shall extend to all cases where, under the Intoxicating Liquors Act, 1828, notices are required to be served in like form to or in the same manner as notices for new licences." I have already pointed out that s. 14 of the Act of 1828 provides for the manner in which notices are to be given under that section, which is not that applicable to notices for new licences. If so, s. 40 of the Act of 1872 is not applicable, because it only applies where notices are required to be served in like form to or in the same manner as notices for new licences. There is no question raised as to the form of the notices, and, if the manner of serving them was right, I cannot say that the justices acted without jurisdiction, or, in other words, that they acted on insufficient notices. I think, therefore, that the certiorari asked for should be refused, on the ground that the order made by the justices is on its face right, and it is not shewn aliunde to be bad.

But, assuming certiorari to be the fitting remedy, as a matter of discretion the certiorari ought not to go. First, on the ground of delay in making the application, in respect of a licence which runs out on October 10; and, second, on the fact that the applicants have not shewn, as it appears by *Reg.* v. *Surrey Justices* (1)

(1) (1870) L. R. 5 Q. B. 466.

they should have shewn, that they have a peculiar grievance of their own beyond some inconvenience suffered by them in common with the rest of the public. The applicants fail to shew that they are persons aggrieved, and in these circumstances I have a discretion which I certainly should not exercise in their favour.

For these reasons the rule granted by this Court for a writ of certiorari will be discharged, and it is unnecessary to go into the appeal against the refusal of the Divisional Court to grant a writ of mandamus, which will be dismissed.

VAUGHAN WILLIAMS L.J. I am of the same opinion. In the first place, the applicants are not entitled to a certiorari unless they satisfy the Court that something has been done by the magistrates outside and beyond their jurisdiction; and, in the second place, they are not entitled to the writ as of right, because it is practically admitted that the Court has a discretion in such a case as this with regard to the issue of the writ.

There has been a good deal of argument as to whether the prosecutors are persons who are aggrieved by what has been done. This is not a case in which any statute has said that the persons who apply for the writ should be persons who are aggrieved, but it is a case in which by the practice of the Courts it has always been insisted upon that the persons applying should be persons who are aggrieved. The question sometimes arises whether the applicant is entitled to the issue of the writ as of right. I do not think any one would contend that the facts disclosed in the affidavits in this case shew that the applicants were aggrieved persons who were entitled to the writ ex debito justitiæ. This matter is dealt with by Blackburn J. in *Reg.* v. *Surrey Justices* (1), where an illustration of a person entitled as of right to the writ is given in the case of a person who has been deprived of an office. But, besides the case of an aggrieved person who applies as of right for the writ, there is another case in which the Court has regard to the

(1) L. R. 5 Q. B. 466.

C. A. 1899

REG. v. NICHOLSON.

Vaughan Williams L.J.

question whether the applicant is an aggrieved person, and that is where the Court has to exercise its discretion as to the issue of the writ. In such a case the Court will consider whether the interest of the applicant is so small, or his grievance so like that of the rest of Her Majesty's subjects, as to leave no sufficient ground for the issue of the writ. Having regard to the affidavits in this case, I am bound to say that I do not think the applicants have disclosed such a case as should induce the Court to make the rule absolute. Apart from this question of interest, there are other matters which should influence our discretion. Having regard to the fact that four months elapsed between the granting of the licence and the application for a certiorari, that in August the time will come round for renewal, that the licence will expire on October 10, and that this was a matter in respect of which the magistrates had to act on an emergency and do the best they could to avoid working an injustice, I do not think this is a case in which we should exercise in favour of the applicants the discretion which it is conceded that we have, or that we should grant the writ at a time when it can serve no useful purpose and might do injustice.

As to the question whether the notices were wrong, the difficulty of construing this legislation does not relieve us from the duty of putting a meaning to it. Sect. 14 of the Act of 1828 deals with the applications that may be made as to licences in case of death, change of occupancy, and other matters, and sets forth the notices required, how they are to be published and in what form, though it does this partly by reference to s. 10. It is conceded that if this is not affected by subsequent legislation the licence-holder had done all that he was bound to do to have his licence removed to his new house. It is said that the proviso to s. 40 of the Act of 1872 has made an alteration, and that it was intended to refer to the notices required under s. 14 of the previous Act. I agree that this is so; but we must ascertain how far that proviso is to be treated as repealing the express provisions of s. 14 of the Act of 1828. There is no pretence for saying that there is any

express repeal; and under these circumstances, in my judgment, when the proviso is applied to notices under the earlier Act, it must be so applied as not to interfere with any express provision of that Act. Taking that view, I put it in the course of the argument whether, there being in the earlier Act an express provision for the publication of a notice on a church door for one Sunday, that was altered by the combined operation of the Wine and Beerhouse Act, 1869, s. 7, and the Licensing Act, 1872, s. 40, to a provision for publication on two consecutive Sundays. Counsel for the prosecutors was constrained to admit that no such substitution had been made. I think that principle was right in that case, and I propose to apply it generally; and, doing so, I come to the conclusion that the subsequent legislation has added no new obligation in any cases in which provision is expressly made in s. 14 of the Act of 1828. It was objected that if this principle were so applied it would render the proviso to s. 40 of the Act of 1872 a nullity; but to this I do not assent. If the provisions of s. 7 of the Wine and Beerhouse Act, 1869, are compared with those of ss. 10 and 14 of the Act of 1828, it will be found that they are by no means identical—for instance, in the form of application—and any one matter to which the proviso can apply is sufficient to do away with the argument that it will be reduced to a nullity if the principle that I have indicated is applied to it. Taking these matters into consideration, the affidavits do not satisfy me that anything was left undone in respect of the notices which was provided for under the Act of 1872, and was not a matter provided for under s. 14 of the Act of 1828, and, according to my understanding of the proviso, the only cases that the prosecutors can pray in aid are those in which they can find a new obligation not imposed by the Act of 1828.

I wish to add that I desire to guard myself from appearing to assent to the proposition that the only record that can be brought up by certiorari must be that of a court of record, or that an order to be brought up must be that of persons exercising judicial, or what have been called quasi-judicial, functions. In my opinion, there are other cases in which it

C. A. 1899

REG. v. NICHOLSON.

will be found that the remedy by certiorari is available, in fact every case in which the record is due by statute.

Rule for certiorari discharged.
Appeal against refusal of writ of mandamus dismissed.

Solicitors for prosecution: *Lloyd-George, Roberts & Co., for Herbert Lewis & Davies, Liverpool.*

Solicitors for defendants: *Chester & Co., for Fielding & Fernihough, Bolton.*

A. M.

1899 *June* 13.

THE UNITED VESTRY OF THE PARISHES OF SAINT MARGARET AND SAINT JOHN THE EVANGELIST, WESTMINSTER *v.* HOSKINS.

Metropolis—Management Acts—Exemptions—Volunteer Corps—Storehouse and Drill-hall.

A building consisting of an armoury, storehouse, and drill-hall of a volunteer corps, which is vested in the commanding officer of the corps and is intended for the use of the corps only, is not exempt from the operation of the sanitary provisions of the Metropolis Management Act, 1855, on the ground that it is occupied and used solely for the purposes of the Crown.

CASE stated by a metropolitan police magistrate.

The respondent had appeared to answer a summons under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 75, charging him with unlawfully neglecting to comply with an order of the appellants ordering that the lowest floor of a building and premises in course of construction be kept at such a level as would allow it to be drained into the public sewer.

The respondent was a builder, and was engaged in constructing the premises in question, which consisted of a building to be used as an armoury, storehouse, and drill-hall by the 2nd Volunteer Battalion of the Royal Fusileers, and which were vested in the usual way in the commanding officer, and were intended for the use of the corps only. The complaint was

that the floor of the basement, which was a long cellar running under the building, was beneath the level of the sewer.

It was objected on the part of the respondent that the magistrate had no jurisdiction upon the grounds that the premises were in the same position as an ordinary military barrack, and the cases of *Pearson* v. *Holborn Union Assessment Committee* (1) and *Jay* v. *Hammon* (2) were cited, and s. 241 of 18 & 19 Vict. c. 120, was referred to. It was contended for the prosecution that the Crown was bound by the provisions of that Act, and in support of the contention the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), s. 116, was relied upon.

The magistrate held that, as the premises were to be used exclusively for military purposes, the provisions of 18 & 19 Vict. c. 120, did not apply to them, and dismissed the summons. It was admitted that the rest of the premises were sufficiently drained.

The magistrate was of opinion that, although the basement, being lower than the sewer, could not be drained into it, it did not appear to require draining, and that probably an opening into the sewer might be a source of danger by letting sewer gas into the hall. He also found that if the vestry were entitled to interfere with the premises at all they could do so at any future time, should the necessity arise.

The magistrate further suggested that, if the Court should be of opinion that he had jurisdiction in the matter, it might save expense if they would intimate their opinion as to whether under the circumstances the basement, which was intended to be used as a canteen, came within the provisions of 18 & 19 Vict. c. 120, s. 75, and whether the premises could be considered to be a "house" within the meaning of that section.

Danckwerts, for the appellants. The mere fact that a building used for the purposes of a volunteer corps is vested in the colonel of the corps does not entitle it to exemption from compliance with the sanitary provisions of the Metropolis Management Act, 1855, and the vestry has a right to interfere in order

(1) [1893] 1 Q. B. 389. (2) (1857) 27 L. J. (M.C.) 25.

1899

WESTMINSTER VESTRY v. HOSKINS.

to see that its requirements are carried out. The buildings of a volunteer corps are in no sense the property of the Crown. By s. 24 of the Volunteer Act, 1863 (26 & 27 Vict. c. 65), the members of a volunteer corps have power to make rules for the management of their property, and by s. 25 the property, including lands, of the corps vests in the commanding officer for the time being; by the volunteer regulations volunteers are compelled to provide such buildings at their own cost; the buildings are therefore their property, and are subject to the control of the local authority, unless exempted by statute. The Metropolis Management Act, 1855, prescribes in s. 241 the extent of the Crown's exemption; but neither that section, nor the exemption in favour of the Crown in s. 116 of the Metropolis Management Acts Amendment Act, 1862 (25 & 26 Vict. c. 102), has any application to the present case. There being in those sections an express exemption in favour of the Crown, the Court cannot, even if this building is in a sense Crown property, go beyond such statutory exemption. The decision in *Pearson* v. *Holborn Union Assessment Committee* (1) has no application to the present case.

Avory, for the respondent. This building is vested in a servant of the Crown, and is occupied and used solely for the purposes of the Crown, and is therefore exempt from the provisions of the Metropolis Management Acts. By s. 76 of the Act of 1855 a vestry has the widest power of demolishing any building erected contrary to any order of the vestry, and the substantial question, therefore, is whether a vestry can demolish a building erected for the purposes of the Crown. In *Pearson* v. *Holborn Union Assessment Committee* (1) the building was used for the same purposes as the building in the present case, and it was held that the fact that it was vested in a servant of the Crown, and was used for the purposes of the Crown, entitled it to exemption from liability to pay poor-rates. The Crown is not bound by a particular statute, unless it is named in it, and therefore, unless an express provision is to be found in the Act of 1855 binding the Crown as to drainage of buildings in its occupation, it is not bound. The onus of shewing

(1) [1893] 1 Q. B. 389.

that the building is not exempt rests on the appellants. The building has been approved by the War Office, and stands on precisely the same footing as barracks, and in *Jay* v. *Hammon* (1) such a building was held to be exempt from the provisions of the Metropolis Building Act, 1855, as being employed for Her Majesty's use or service; the present case is indistinguishable from that case upon the facts.

GRANTHAM J. I regret that I am unable to uphold the contention of the learned counsel on behalf of the respondent, for it seems reasonable that buildings which are the property of, and are used for the purposes of, volunteer corps, should not be liable to be interfered with by the vestries. The respondent's claim to exemption is in effect based upon the decision in *Jay* v. *Hammon* (1), where a building owned by the Commissioners of Lieutenancy for London under the Militia Acts, and used for the purposes of the London militia, was held to be exempt from the operation of the Metropolis Building Act, 1855, as a building "employed for Her Majesty's use or service"; reliance was also placed upon *Pearson* v. *Holborn Union Assessment Committee* (2), where it was held that premises occupied by a volunteer corps for the purpose of the service of the corps, and being reasonably necessary for such service, were occupied by servants of the Crown for the purposes of the Crown, and were therefore exempt from rates. I entirely agree with those decisions and with the principle that buildings which are held by servants of the Crown in the right of the Crown should not be liable to interference at the hand of the vestries; but is that principle to apply to the case of buildings built, as they often are, by subscriptions of the public and of individual volunteers, and held for the purposes of the volunteers by the colonel of the corps? In such a case I do not think that the mere fact that the building is vested in the colonel is sufficient to justify me in holding that it belongs to the Crown; it is used for military purposes, and under the decision in *Pearson* v. *Holborn Union Assessment Committee* (2) would appear to be exempt from poor-rate, but no case goes

(1) 27 L. J. (M.C.) 25. (2) [1893] 1 Q. B. 389.

1899

WESTMINSTER VESTRY v. HOSKINS.

Grantham J.

the length of saying that a building is necessarily the property of the Crown and exempt from the provisions of such a section merely because it is vested in the colonel, and is used for military purposes. I should be sorry if the learned magistrate were to hold on the facts that the vestry had a right to interfere with this building; but that is not the question before us. On this very narrow ground, therefore, that volunteers are not entitled to hold buildings free from the control of the local authority, the case must go back to the learned magistrate.

LAWRANCE J. I have felt considerable doubt during the argument, but I am not prepared to dissent from the judgment of my learned brother.

Appeal allowed.

Solicitor for appellants: *Percy Gates.*

Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey.*

W. J. B.

C. A.

1899

July 25.

[IN THE COURT OF APPEAL.]

ATTORNEY-GENERAL *v.* MAYOR, ALDERMEN, AND CITIZENS OF NEWCASTLE-UPON-TYNE AND HILL MOTUM.

Practice—Discovery—Affidavit of Documents—Production—Matter tending to impeach Case of Party claiming Privilege—Information by Attorney-General—Claim of Crown to Foreshore.

On an information by the Attorney-General claiming on behalf of the Crown a declaration of title to foreshore, it was ordered by a Divisional Court that the defendant should make a further affidavit of discovery and should produce for inspection by the informant all documents therein specified except such as the defendant should by his affidavit identify and state to relate solely to the case of the defendant and to contain nothing impeaching the case of the defendant or supporting the case of the informant:—

Held, by the Court of Appeal, on the authority of *Morris* v. *Edwards*, (1890) 15 App. Cas. 309, that the order must be varied by striking out the words "impeaching the case of the defendant or," as the defendant's affidavit would be sufficient to support an objection to produce documents without those words.

APPEAL from the order of a Divisional Court (Day and Lawrance JJ.) as after-mentioned.

This was an information in the Queen's Bench Division (Queen's Remembrancer's side) by the Attorney-General on behalf of Her Majesty against the corporation of Newcastle-upon-Tyne and Hill Motum, the town clerk of Newcastle-upon-Tyne, who was made a party thereto for the purpose of discovery, claiming a declaration that the foreshore and bed as far as mid-stream of the river Tyne, opposite to the manors of Gateshead and Whickham respectively and within certain limits, were vested in Her Majesty the Queen her heirs and successors as part of the hereditary revenues and property of the Crown subject to such leases on behalf of Her Majesty as were in force, and that the title and possession of Her Majesty and of her lessees and grantees might be quieted against the defendants the corporation.

The informant filed interrogatories for the examination of the defendants.

The defendants by their answer denied the title of the Crown and alleged that from time immemorial they had been and claimed to be entitled to the whole of the foreshore and bed of the Tyne within the limits of the port of Newcastle, including the part claimed by the Crown, and that they had been found to be entitled thereto by inquisitions taken in the 26th year of Henry 6 and by a judgment on information in the 4th year of Charles 1.

By an affidavit in further answer (1) to one of the interrogatories filed for the examination of the defendants as to documents in their control or possession the defendant Hill Motum stated that the defendant corporation had in their possession, custody, or power, or in the possession, custody, or power of their solicitor, the documents and entries in books relating to the river Tyne mentioned or referred to in the 1st and 2nd parts of the schedule to his affidavit, but that the defendants objected to produce the said documents and entries in books mentioned or referred to in the 2nd part of the said schedule on the ground that the said documents and entries in books related solely to the title of the defendant corporation and did

(1) The defendants' original answer was held insufficient: see *Attorney-General* v. *Newcastle-upon-Tyne Corporation*, [1897] 2 Q. B. 384.

C. A. 1899

ATTORNEY-GENERAL v. NEWCASTLE-UPON-TYNE CORPORATION.

not in any way tend to prove or to support the title of the informant, or were the corporation's briefs and other documents relating to actions, suits, and legal proceedings between the defendant corporation and others, or were cases for the opinion of counsel on behalf of the defendant corporation and the opinions of counsel thereon and papers relating thereto, or were minutes of a committee of the defendant corporation, appointed after the title of the corporation had been disputed on behalf of the Crown, for the purpose of protecting the interests of the corporation in the foreshore and bed of the river Tyne, or were correspondence between the deponent as solicitor for the defendants and his London agents, Mr. Stuart Moore and others, after the title of the corporation had been disputed on behalf of the Crown, for the purpose of obtaining information to enable the deponent to advise the corporation as their solicitor in contemplation of a suit on behalf of the Crown and to prepare and conduct the defence to the suit, or were reports made at the deponent's instance acting as solicitor for the corporation in order to enable him to advise the corporation in anticipation of litigation by the Crown and to prepare and conduct their defence to the suit, or were solicitor's general papers made or collected by him or at his instance for the purpose of advising the corporation and to prepare and conduct their defence to the suit: and that, except as aforesaid, the defendants had not in their possession, custody or power, or in the possession, custody or power of their solicitors or of any person on their behalf any documents relating to the matters in question.

On an application by the informant for further discovery and inspection, the Divisional Court made an order for further discovery of documents on affidavit by the defendant Hill Motum and for the production by the defendants for inspection by the informant of all documents and entries specified in the affidavit to be made by the defendant Hill Motum except such as he should by his affidavit identify and state to relate solely to the case of the defendant corporation and to contain nothing impeaching the case of the defendant corporation or supporting the case of the informant, or to be communications between

the defendant corporation their solicitors and counsel for the purpose of obtaining legal advice, or to be documents which had come into existence during or in anticipation of litigation by or against the defendant corporation for the purpose of enabling the solicitors or counsel of the defendant corporation to conduct such litigation or to advise the defendant corporation with reference thereto, but not including (among the excepted documents) transcripts of shorthand writer's notes of public legal proceedings or such portions of briefs in proceedings prior to this suit as contained indorsements of the result of such proceedings or contained copies of pleadings or of other documents not privileged.

The defendants appealed against this order. (1)

Robson, Q.C., and *William Graham* (*Stuart Moore* with them), for the defendants. The case of *Morris* v. *Edwards* (2), in the House of Lords, is conclusive to shew that an affidavit such as the defendants' is sufficient to support the claim that documents are privileged against inspection, and that it is not necessary that the affidavit should state that the documents do not contain anything which tends to impeach the defendants' title. It is true that case was one of ejectment, but the present proceeding, though different in form, is in substance the same as an action of ejectment, and the observations of the House of Lords were not limited to ejectment. The Crown does not stand on a footing different from that of any other litigant with regard to its right to inspect documents.

[They cited *Attorney-General* v. *Corporation of London*. (3)]

Sir R. B. Finlay, S.-G., and *Vaughan Hawkins*, for the Crown. It is submitted that the Crown is entitled to inspection of any document containing matter which tends to impeach the case of the defendants. The case of an information claiming a declaration of the title of the Crown to foreshore is not

(1) So much of the facts, arguments, and judgments as related to the question of further discovery by the defendants is omitted from this report, the only reportable point involved relating to the question of inspection. The order of the Divisional Court for further discovery was affirmed.

(2) 15 App. Cas. 309.

(3) (1850) 2 Mac. & G. 247.

C. A. 1899

ATTORNEY-GENERAL v. NEWCASTLE-UPON-TYNE CORPORATION.

analogous to the case of an ordinary action of ejectment. The title to foreshore is by the general law vested in the Crown, unless the Crown has granted it away, and, therefore, anything which impeaches the defendants' title must support the case for the Crown. The case for the Crown necessarily is that the defendants have no title from the Crown. In actions of ejectment the plaintiff has to recover by the strength of his own title, and, though there may be a flaw in the defendant's title, the plaintiff would not necessarily be entitled to succeed. The decision in *Morris* v. *Edwards* (1) really turned on considerations applicable only to the action of ejectment. It is submitted that this case is concluded by the decision of this Court in *Attorney-General* v. *Newcastle-upon-Tyne Corporation.* (2) There is a series of cases which shew that the statement that the documents alleged to be privileged contain nothing which tends to impeach the defendant's case is essential in cases other than ejectment. [They cited on this point *Jones* v. *Williams* (3); *Combe* v. *Corporation of London* (4); *Minet* v. *Morgan* (5); *Hastings Corporation* v. *Ivall* (6); *Attorney-General* v. *Emerson* (7); *Attorney-General* v. *Thompson* (8); *Harris* v. *Harris.* (9)] The case of *Emmerson* v. *Ind, Coope & Co.* (10) was one of ejectment. In ordinary cases of ejectment it may be that what impeaches defendant's case does not tend to set up plaintiff's case; but in the case of a claim of foreshore by the Crown what impeaches the defendant's case must tend to set up the title of the Crown. The affidavit in any case ought to state that the documents relate solely to the "case" instead of the "title" of the defendant corporation and do not support the "case" of the informant, because in the case of a claim to foreshore by the Crown the title of the Crown is not an affirmative title but depends on the non-existence of a title derived from the Crown.

William Graham, in reply.

(1) 15 App. Cas. 309.
(2) [1897] 2 Q. B. 384.
(3) (1837) 2 M. & W. 326.
(4) (1842) 1 Y. & C. Ch. 631; (1845) 10 Jur. 57.
(5) (1873) L. R. 8 Ch. 361.
(6) (1873) L. R. 8 Ch. 1017.
(7) (1882) 10 Q. B. D. 191.
(8) (1849) 8 Hare, 106.
(9) (1844) 4 Hare, 179.
(10) (1886) 33 Ch. D. 323.

A. L. SMITH L.J. [After dealing with the question as to further discovery, the Lord Justice said:—] I feel some difficulty with regard to the question as to production of documents for inspection. I well remember, speaking for myself, that, when I was at the bar, it used to be the practice, particularly after the case of *Minet* v. *Morgan* (1), where a party to an action claimed that documents were privileged against production, to state in the affidavit that they did not contain anything which tended to impeach his own case. A number of cases were cited to us which go to shew that such a statement was necessary. Among them were *Combe* v. *Corporation of London* (2); *Minet* v. *Morgan* (1); *Corporation of Hastings* v. *Ivall* (3); and *Attorney-General* v. *Emerson*. (4) On the other hand, I believe, if the cases were all gone into, that there are other decisions which are not altogether in accord with the cases I have mentioned. It is clear no doubt that in an action of ejectment the defendant is not bound to produce his title-deeds for inspection. He can say in his affidavit of discovery that he has documents which are his own title-deeds and have nothing to do with his opponent's case. In that action the plaintiff has to recover by the strength of his own title, and it would be monstrous that a defendant should be obliged, in order to avoid production of his title-deeds, to swear that there is no flaw in them. It was argued that the present action is not one of ejectment, and that no doubt is true. It is an information by the Attorney-General claiming a declaration of title to foreshore on behalf of the Crown. If I had had to act alone on my own judgment, I should have been very much disposed to say that in regard to this case the allegation that there was nothing in the documents tending to impeach the defendants' case was necessary in order to support the claim of privilege. I cannot however get over what was said in the House of Lords in the case of *Morris* v. *Edwards*. (5) It is true that that was an action of ejectment; but the judgments are not based on that consideration, but put the case as broadly as can

(1) L. R. 8 Ch. 361.
(2) 1 Y. & C. Ch. 631; 10 Jur. 57.
(3) L. R. 8 Ch. 1017.
(4) 10 Q. B. D. 191.
(5) 15 App. Cas. 309.

C. A. 1899

ATTORNEY-GENERAL v. NEWCASTLE-UPON-TYNE CORPORATION.

A. L. Smith L.J.

be. Lord Halsbury L.C. in giving judgment said that the affidavit, which stated that the documents related solely to the defendant's title and did not in any way tend to prove or to support the title of the plaintiffs, was according to the recognised practice of the courts quite sufficient; and he did not put that in any way as being because the action happened to be one of ejectment. Lord Herschell in giving judgment said: "The first objection taken by Mr. Brown is that the answer is insufficient, inasmuch as it does not contain the further statement that the deeds and documents do not tend to impeach the defendant's own title. He has produced no authority to shew that any such statement is necessary." The learned Lord then proceeded to refer to *Attorney-General* v. *Emerson* (1), and *Combe* v. *Corporation of London* (2), which it will be remembered are not cases of ejectment. He said: "It is true that in the case of the *Attorney-General* v. *Emerson* (1) Baggallay L.J. quoted the statement by Knight Bruce L.J. in *Combe* v. *Corporation of London* (2) of the allegations sufficient to support the claim to protection amongst which was the allegation that the documents did not contain anything impeaching the defence. But, my Lords, I do not understand it to have been there laid down in terms that it was essential that those words should appear in the answer in addition to such words as are to be found in the present case. In the case of *Emmerson* v. *Ind, Coope & Co.* (3) the words were similar to those which are used in the present case, and they were held in the Court of Appeal to be sufficient. It appears to me therefore that primâ facie this answer, according to the authorities, is absolutely sufficient." Lord Macnaghten entirely agreed with the Lord Chancellor and Lord Herschell. We are bound loyally to follow that decision, and, that being so, I think we must come to a conclusion at which I might not but for that decision have arrived, namely, that an allegation that the documents contain nothing which tends to impeach the defendants' case is not necessary to support the claim of privilege in this case. I therefore think that the order of the

(1) 10 Q. B. D. 191.

(2) 1 Y. & C. Ch. 631; 10 Jur. 57.

(3) 33 Ch. D. 323.

Divisional Court must be varied by striking out the words "impeaching the case of the defendant corporation or." I also wish to add that I think that the defendants' affidavit ought to state that the documents relate solely to the "case" (instead of "title") of the defendant corporation, and contain nothing supporting the "case" instead of "title" of the informant.

VAUGHAN WILLIAMS L.J. The question is whether it is sufficient to support the claim that documents are privileged from production that the defendants' affidavit should state simply that the documents relate solely to the case—for I entirely agree with my brother A. L. Smith L.J. that the word should be "case" not "title"—of the defendants; or whether it ought to contain the further statement that the documents contain nothing which tends to impeach the case of the defendants. I agree that the case of *Morris* v. *Edwards* (1) is conclusive on this matter. It is practically conclusive, that is to say, that an affidavit may be quite sufficient without containing that further statement. I go a step further however, and say that I should have come to the same conclusion as the House of Lords came to in that case, if I understand their decision aright. So far as the history of discovery is concerned, I do not at all acquiesce, speaking for myself, in the proposition that from the first it was necessary in Chancery and at common law that the affidavit should contain such a statement as I have mentioned. I think on the contrary that it is manifest, on looking at the cases, that, in Chancery, and certainly at common law, down to a time within my own memory it was not necessary that the affidavit should contain such a statement. It was in my opinion both in Chancery and at common law the undoubted practice up to a certain time that the obligation to make discovery had relation to the case made by your opponent, and you were not bound to disclose documents relating to your own case so as to enable your opponent to pick holes in your title or case. But I agree that there has been a series of cases which were cited to us, and which do

(1) 15 App. Cas. 309.

C. A. 1899

ATTORNEY-GENERAL v. NEWCASTLE-UPON-TYNE CORPORATION.

Vaughan Williams L.J.

seem to lay it down that the affidavit ought to contain a statement to the effect that the documents for which privilege is claimed do not contain anything which tends to impeach the case for the deponent. But, though that is stated in those cases, I do not think that any one looking at the cases would say that they shew the proposition to be generally true that, wherever the failure of the deponent's case would have a tendency to assist the case of the opposite party, or wherever it is relevant in the sense that the deponent is setting up a title the maintenance or defeat of which will be relevant in the action, then that is a case in which the deponent is bound to produce for inspection the documents upon which he proposes to rely as supporting his case, or be disentitled to rely on them, unless he is prepared to swear that they do not contain anything which suggests any flaw in his title or would tend to impeach his case. When one looks at the cases with regard to ejectment it seems plain that the proposition so stated is far too general. Look at the case of *Owen* v. *Wynn*. (1) There the plaintiffs claimed to be the owners in fee simple of land, and the defendant alleged that they were freehold tenants of a manor of which he was the lord, and that they had only customary rights over the land; and the plaintiffs asked for inspection of the court rolls of the manor. It was held that they were not entitled to such inspection. Jessel M.R. said in giving judgment: "The plaintiffs say they have a right to see the documents, although they claim adversely to the manor and the manorial rights, and they say, 'We should like to see your title before the trial, in order to pick holes in it.' That is certainly not a course which the Court will sanction"; and James L.J. said in substance the same thing. I do not mention that case as being on all-fours with the present case in any way, but merely in order to shew that the rule as stated by the Solicitor-General was much too wide. It is obvious that there are some cases in which documents are clearly privileged, and a party to an action is not bound to produce them for inspection, although there may be something in them which would tend to impeach his own case

(1) (1878) 9 Ch. D. 29.

or title. One has to endeavour to draw the line in the particular case. In so far as the decision in *Morris* v. *Edwards* (1) goes to shew that it is not always essential in order to support the claim that documents are privileged against inspection to state that they do not contain anything which tends to impeach the title of the party claiming the privilege, I entirely agree with it. It may be a very desirable thing at some time or other that the line on this subject should be accurately drawn. It may be that it should be something of this kind, namely, that a party ought to produce documents which impeach his own title if at the same time they go to support the affirmative title of the other party. But, assuming that to be the rule, it would not help the Crown in the present case. The Solicitor-General admitted that the rule on the subject which is applicable in the case of ordinary litigants would not assist the Crown; but he said that the case of the Crown in this litigation was different from the case of an ordinary litigant claiming property, because the Crown has not to set up a particular affirmative title, but has a primâ facie general title to foreshore, and therefore anything which goes to suggest a flaw in the defendants' affirmative title goes to support the title of the Crown. I do not agree to that contention, and I do not think that there is any authority for the distinction which the Solicitor-General so endeavoured to draw. On these grounds I think that an affidavit claiming privilege for documents in this case would be sufficient without the addition mentioned in the order of the Divisional Court.

Order varied accordingly.

Solicitor for Crown: *Solicitor to Office of Woods, Forests, and Land Revenues.*

Solicitors for defendants: *Collyer-Bristow, Russell, Hill & Co., for Hill Motum, Town Clerk of Newcastle-on-Tyne.*

(1) 15 App. Cas. 309.

E. L.

C. A.
1899
June 27.

[IN THE COURT OF APPEAL.]

OSMOND *v.* MUTUAL CYCLE AND MANUFACTURING SUPPLY COMPANY, LIMITED.

Practice—Costs—Solicitor and Client—Shorthand Notes—Patent Action.

Where on the trial of a patent action it was agreed in open court between counsel for the parties with the sanction of the judge that a shorthand writer's note of the evidence to be taken on behalf of the parties jointly should be used as the record of the evidence for the purposes of the trial :—

Held, that the solicitor of a party to the action was entitled to charge his client with money disbursed as his share of the cost of taking the shorthand note.

In re Blyth and Fanshawe, (1882) 10 Q. B. D. 207, distinguished.

APPEAL from an order of Channell J. at chambers refusing to review the taxation of a master as after-mentioned.

The Dunlop Pneumatic Tyre Company brought an action for infringement of their patent against a firm called Marwood & Cross, who were customers of the Mutual Cycle and Manufacturing Supply Company, the respondents in the appeal. It was agreed by Mr. Holmes, who was the managing director of the Mutual Cycle Company, and Mr. Lee, who was the managing director of a company called the Puncture Proof Pneumatic Tyre Company, which was interested in the question of infringement, that the former company should take up the defence in the action against Marwood & Cross, and that the two companies should share the expenses of it equally. Mr. A. W. Osmond, the appellant, was retained by Holmes on behalf of the Mutual Cycle Company to act as their solicitor in conducting the defence. It appeared that the appellant before the trial agreed with the solicitor for the Dunlop Pneumatic Tyre Company to join with him in having a shorthand note taken of the evidence in the action and pay half of the costs of its being taken. It was stated by Lee in an affidavit made by him that Holmes mostly left the giving of instructions as to the proceedings in the action on behalf of the

two companies to him; that he informed Holmes that a shorthand note would be necessary, and that Holmes agreed to its being taken; that he, Lee, thereupon instructed the appellant accordingly, and that he informed Holmes of the agreement made by the appellant with the Dunlop Company's solicitor as to the shorthand notes. Holmes on affidavit denied that Lee had ever told him that it would be necessary to have a shorthand note taken, or that any agreement with regard to the expenses of the same had ever been made by him or by his authority, or that he had ever been told of any such agreement: he further stated that he was never informed by the appellant or by any one representing him, and that he did not know that the costs of taking the shorthand note might not be allowed on taxation as against the Dunlop Pneumatic Tyre Company if they failed in the action. At the commencement of the trial of the patent action before Romer J. the learned judge inquired of counsel whether a shorthand writer's note of the evidence was to be taken. The counsel for the defendants thereupon said (in substance) that, if there was not an arrangement to have joint shorthand notes taken and a printed transcript, he should object to any such notes being used in the trial: and that it would be a most unreasonable thing for the plaintiffs to refuse to enter into an arrangement for having joint shorthand notes taken, the defendants being willing to join in such an arrangement and in paying for the notes. The counsel for the plaintiffs then stated that an arrangement to that effect had been made. The Court of Appeal were of opinion, as will be seen, that what took place in court amounted to an agreement with the sanction of the judge that the shorthand notes to be taken on behalf of the parties jointly should be used as the record of the evidence for the purposes of the trial. The trial then proceeded, and, after lasting ten days, ended in a verdict for the plaintiffs. In pursuance of the above-mentioned arrangement the appellant paid half of the expenses of the shorthand notes. On taxation of the costs of the action by the Dunlop Pneumatic Tyre Company against Marwood & Cross the cost of the shorthand notes, less the amount paid by the appellant, was allowed to the plaintiffs. It was stated,

C. A. 1899

OSMOND v. MUTUAL CYCLE AND MANUFACTURING SUPPLY COMPANY.

however, in the affidavits on behalf of the respondents, the Mutual Cycle Company, that this was because the item was not contested on taxation by the appellant as it should have been. The Puncture Proof Pneumatic Tyre Company paid the appellant half of his costs and charges of defending the patent action. The respondents refused to pay the other half on the ground that their managing director, Holmes, had no authority to incur this liability on behalf of the company. The appellant thereupon brought an action against the respondents for the unpaid half of the said costs and charges. At the trial the judge decided that Holmes had authority to bind the respondents, and gave judgment for the appellant for the amount claimed subject to taxation of his bill. On taxation the master disallowed the item in respect of the amount paid by the appellant for the shorthand notes on the authority of *In re Blyth and Fanshawe*. (1) On appeal to Channell J. at chambers he affirmed the decision of the master.

S. T. Evans, for the appellant. The rule laid down in *In re Blyth and Fanshawe* (1) does not apply to the present case. That case decides that, where costs are unusual and such as may be disallowed as between party and party on taxation, it is the duty of the solicitor before incurring them to point that out to the client, and, if he does not, he cannot recover them against his client. It is submitted that the effect of what took place in this case is that there was an agreement binding on the parties to the patent action that the costs of the shorthand notes should be party and party costs, and they were in fact allowed as between party and party in that action. The decision in *In re Blyth and Fanshawe* (1) only applies to unusual and unnecessary costs which may be considered a luxury. In a patent action such as this, which lasted ten days, and involved very complex and elaborate scientific details, it is practically impossible for the judge himself to take a sufficient note. The arrangement that the parties should share the cost of the shorthand writer's note obviously only applied to the

(1) 10 Q. B. D. 207.

question how in the first instance it should be paid for, leaving it to be determined by the result of the action on whom the cost was ultimately to fall. [He cited *Castner Kellner Alkali Co.* v. *Commercial Development Corporation.* (1)]

Bray, Q.C., and *Montague Shearman*, for the respondents. There was nothing in the present case which amounted to an agreement that the costs of the shorthand writer's notes should be costs in the cause. The parties themselves might no doubt expressly make such an agreement, but a solicitor has no authority to make such an agreement with the solicitor for the other party unless he is specially authorized to do so by his client, of which there was no evidence here. The agreement, if any, was merely that the parties should share the expenses of having the shorthand note taken, not that they should be costs in the cause. That being so, the rule in *In re Blyth and Fanshawe* (2) applies, and, the appellant not having informed his clients that, if they succeeded, the cost of the shorthand notes might be disallowed on taxation as against the Dunlop Pneumatic Tyre Company, he cannot recover from his clients the amount which he has disbursed for shorthand notes. The fact that the Dunlop Company were allowed the item in respect of those costs on taxation, because no objection was taken to it, does not affect the present case. What took place in court clearly did not amount to an order by the judge allowing these costs as party and party costs. The judge's sanction was not required for a mere agreement that a shorthand note should be taken on behalf of the parties jointly, and that they should share the expenses; and therefore the judge cannot be held by implication to have made an order that these costs should be party and party costs. The authorities shew that, unless such an order is made, they cannot be allowed as between party and party: *Ashworth* v. *Outram.* (3) The costs of these shorthand notes were clearly unusual and extraordinary costs which come within the rule in *In re Blyth and Fanshawe.* (2) The cases draw no distinction for this purpose

(1) [1899] 1 Ch. 803. (2) 10 Q. B. D. 207.
(3) (1878) 9 Ch. D. 483.

C. A. 1899

OSMOND v. MUTUAL CYCLE AND MANUFACTURING SUPPLY COMPANY.

between patent cases and any other cases: *Earl De la Warr* v. *Miles*. (1)

[They also cited *In re Broad and Broad*. (2)]

S. T. Evans, for the appellant, was not called upon to reply.

A. L. SMITH L.J. I am of opinion that we ought to allow the appeal in this case, and that in so doing we shall not be trenching on any of the authorities which have been cited, and by which we are bound. The question which we have to decide has reference to the disallowance on taxation of an item in a solicitor's bill of costs, and it arises thus. The Dunlop Pneumatic Tyre Company brought an action for infringement of their patent against Marwood & Cross, who were customers of the Mutual Cycle Company. The latter company took up the defence of the action, and may be considered for the present purpose as being the real defendants therein. It was arranged between them and the Puncture Proof Pneumatic Tyre Company, who were interested in the question involved, that the two companies should share the expenses of the defence of the action between them. The appellant acted as solicitor to the Mutual Cycle Company in defence of the action. The result of a long trial before my brother Romer was that the defence in the action of infringement was unsuccessful. The plaintiffs in that action subsequently carried in their bill of costs, and an item in that bill was allowed in respect of the amount paid by them for the shorthand writer's notes of the evidence at the trial. The appellant subsequently sent in his bill of costs against his clients, and in that bill was an item in respect of the amount which he had disbursed out of his own pocket for the shorthand notes. The half of his bill not being paid by the respondents, he brought an action for that amount against them, and recovered judgment in that action subject to taxation of the bill. The contention is that the sum which the appellant paid out of his own pocket for the shorthand notes must be borne by him personally, and not by his clients. If that contention were correct, it would in my

(1) (1881) 19 Ch. D. 80. (2) (1885) 15 Q. B. D. 420.

opinion be a great hardship upon the solicitor under the circumstances of this case. We have been referred by the respondents' counsel to the case of *In re Blyth and Fanshawe* (1), in which it was no doubt held by this Court that a solicitor is not entitled to charge his client with unusual expenses in the conduct of an action, unless he has duly notified his client that those expenses may not be allowed on taxation as between party and party. In giving judgment in that case Baggallay L.J. said: "I take it to be the general rule of law, and an important rule which is to be observed in almost all cases, that, if an unusual expense is about to be incurred in the course of an action, it is the duty of the solicitor to inform his client fully of it, and not to be satisfied simply by taking his authority to incur the additional expense, but to point out to him that such expense will or may not be allowed on taxation between party and party whatever may be the result of the trial." Lindley L.J. in concurring said: "The first question relates to the shorthand writer's notes. It was the duty of the solicitors to Mr. Wells to give him advice and protection against unnecessary expense, and to point out to him that, if he chose to engage shorthand writers, the cost of having the transcript of shorthand notes might not be allowed as between party and party." It was held in that case that, as the solicitors had not notified their client that the costs of the shorthand notes might not be allowed as between party and party, they could not charge their client with them. Other cases have been cited which are to the same effect. Coming to the present case, the question is whether it comes within those authorities. It was argued that it is not within the scope of the authority of the solicitor on one side to agree with the solicitor on the other side that the costs of shorthand notes shall be costs in the cause, and that the solicitor cannot recover such costs from his client unless he has got special authority from his client to incur them, having previously informed him that they may not be allowed on taxation as between party and party; but what happened in the present case? When the case came on for trial the judge took the initiative, and inquired whether a

(1) 10 Q. B. D. 207.

C. A. 1899

OSMOND v. MUTUAL CYCLE AND MANUFACTURING SUPPLY COMPANY.

A. L. Smith L.J.

shorthand note was to be taken. One knows perfectly well that in patent cases where there are complicated and scientific details in conflict a shorthand note is really a necessity. No judge can take down a sufficiently accurate detail of the evidence necessary for present and after use. Moreover, if he were to try to do so, the cause would last double the time it at present lasts, which in all conscience is long enough. Instead of a shorthand note in such cases being an unusual and unnecessary expense, it is in my opinion usual and essential to the proper trial and subsequent adjudication of the case. The judge, as I have said, asked whether a shorthand note was being taken. A discussion between the counsel ensued, the counsel on one side saying that, unless some arrangement were made for the taking of a joint shorthand note, he should object to shorthand notes being used in the trial. It was then stated that a joint arrangement had been made for having a shorthand note taken, and the case proceeded and lasted for ten days. It seems to me that the clear effect of what took place was that there was a bargain made in open court between the parties at the instance and with the sanction of the judge that a shorthand note should be taken for the purposes of the trial and constitute its record, and that the expenses of having it taken should be shared between the parties. It is said that there was no agreement that those expenses should be costs in the cause. It is perfectly clear that there was an agreement in open court such as I have stated, namely, that the expense of taking the notes should be borne by the parties, and the notes should be used by the parties for the purposes of the trial. That appears to me to carry an agreement that they should be costs in the cause. The appellant, in pursuance of that agreement, paid half of the cost of taking the shorthand note out of his own pocket. Why is he not entitled to recover the money so paid by him as money paid for his clients at their request? It is said that the case of *In re Blyth and Fanshawe* (1) shews that he is not because he had not informed his clients that these were costs which, if they succeeded, they might not be entitled to recover as against the opposite party on taxation. In my judgment

(1) 10 Q. B. D. 207.

the rule in that case does not apply to a case like this where a shorthand note is absolutely essential, and counsel agree in court with the sanction of the judge that one shall be taken and used as the record of the trial. The rule in *In re Blyth and Fanshawe* (1) only applies to ordinary cases in which it is not essential for the purposes of the case that there should be a shorthand note, and where therefore the expense of taking such a note is an unnecessary and unusual expense. I do not think that in allowing the costs of the shorthand notes in this case we are in any way impugning any of the authorities which have been cited. If, after what took place at the trial in this case, the solicitor were obliged to bear these costs himself it would in my opinion be a gross injustice.

VAUGHAN WILLIAMS L.J. I am of the same opinion. I have during the argument been able to look at most of the material authorities and also at a text-book in which I find a statement of the law on the subject, namely, Mr. W. E. Gordon's book on the Law of Costs. I think that in all probability I should not be able to state the result of the cases more concisely or more accurately than he has done. He says, on p. 227: "The general rule is that the costs of shorthand writers' notes of the evidence are not primâ facie to be allowed on taxation between party and party; if there is any special reason for allowing them, application should be made at the hearing for a special direction from the Court." He cites in support of that statement various authorities, among which is the case of *Ashworth* v. *Outram* (2), to which we have been referred. His statement of the effect of the cases appears to me to be accurate, subject, as regards the statement that the application should be made at the hearing, to the qualification, which he himself points out further on, that the authorities appear to shew that the order allowing the costs of shorthand notes as between party and party can not only be made by the judge at the hearing but also by the Court of Appeal when the case comes up on appeal, and that Court may allow the costs of shorthand notes used in the appeal whether taken for the

(1) 10 Q. B. D. 207. (2) 9 Ch. D. 483.

C. A. 1899

OSMOND v. MUTUAL CYCLE AND MANUFACTURING SUPPLY COMPANY.

Vaughan Williams L.J.

purpose of the appeal or not. Of course there is a further possible qualification where the client, after due warning given to him as to the nature of the costs and that they are such as may not be allowed on taxation, chooses to enter into an agreement with the other side that they shall be treated as party and party costs. The rule so stated by Mr. Gordon is one of old standing, and I should be very sorry to say anything that might have the effect of trenching upon it. There is a further rule which has been laid down in the case of *In re Blyth and Fanshawe*. (1) There is a short statement of that rule in Mr. Gordon's book on p. 228 as follows: "It is the duty of a solicitor who in the course of an action is about to incur unusual expenses—such as the costs of shorthand notes of evidence given at a reference—to point out to his client that the additional expenses so incurred will not be allowed to him even if successful in the action on taxation between party and party; and in default of so doing the solicitor will not be entitled to charge the costs so incurred on taxation between solicitor and client." Subject to the observation that I think upon the cases in strictness the statement should run "will or 'may' not be allowed to him," this appears to me to be an accurate statement of the rule. Now I am not going to base my judgment in this case upon the ground that a patent action is a peculiar sort of action or that the taking of shorthand writers' notes in such an action is a usual expense, though in another action it might be unusual. I do not say that it is not so, but, before assenting to that proposition, I should like to consider the matter further and to consult the taxing masters. If there is a practice on taxation with regard to the costs of shorthand notes in patent cases I should be sorry to say anything that might seem like a departure from that practice. I will state shortly the ground upon which I think that the taxation ought in this case to be reviewed and this item allowed. I do not base my decision merely on any agreement between the respective solicitors or between the respective litigants in the action. I have not much doubt on the affidavits that the authority given to Mr. Lee by Mr. Holmes included autho-

(1) 10 Q. B. D. 207.

rity to do anything that might be right and proper in the action including the making of an agreement as to the cost of shorthand notes. But it is unnecessary to say any more as to that, as I do not base my judgment upon it. The ground of my decision is that, on looking at the shorthand notes of the proceedings before my brother Romer, it is clear that with his sanction it was arranged so as to bind both parties that the transcript of the shorthand notes should be the authentic record of the evidence in the case, which thenceforth both the parties were entitled to use before the judge as of right, and, if the case went to appeal, to refer to in the Court of Appeal just as in an ordinary case the judge's notes of the trial are referred to. In my judgment, when that result is arrived at, the rules which I have read and which I take to be correct as to the disallowance of the costs of shorthand notes have no application under these circumstances. I think that the appellant is entitled to be recouped by his clients those expenses out of pocket which he has incurred in obtaining the authentic record of the evidence for the use of the judge, for I have no doubt that in truth and in fact the transcript of the shorthand notes was furnished to the judge and used by him as the authentic record of the evidence. I only wish to say in addition that one cannot help being aware that such arrangements are frequently made in patent actions and that judges take the view in such actions that a shorthand note should be taken as the authentic record of the evidence. Where that is done with the consent of the judge I think the rules laid down in the authorities to which we have been referred by the respondents have no application.

Appeal allowed.

Solicitor for appellant: *J. T. Lewis, for A. W. Osmond.*

Solicitors for respondents: *Pollock & Co., for J. E. Hodding, Leicester.*

E. L.

C. A.
1899
July 31.

[IN THE COURT OF APPEAL.]

GOODFELLOW *v.* GRAY.

Practice—Solicitor's Lien—Charging Order—Set-off of Judgments—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Order* LXV., *r.* 14.

An order may be made allowing a judgment debtor to set off against the damages due from him damages due to him from the judgment creditor on a judgment in another action, notwithstanding the existence of an order under the Solicitors Act, 1860, s. 28, charging the first-mentioned damages with a solicitor's costs:—

So *held* by A. L. Smith L.J. and Vaughan Williams L.J., the latter doubting.

APPEAL from an order of Channell J. at chambers allowing a set-off of judgments as after-mentioned.

The defendant Gray had recovered judgment in an action brought by him against the plaintiff Goodfellow for the sum of 140*l.*, and had only been able to obtain satisfaction of that judgment to the amount of 20*l.* The plaintiff Goodfellow subsequently brought an action for slander against the defendant Gray, and recovered judgment in that action for 40*l.* damages. The solicitor, who had acted for Goodfellow in the last-mentioned action, obtained from Channell J. at chambers ex parte, under s. 28 of the Solicitors Act, 1860, an order charging with his costs the amount recovered in the action. After the charging order had been made, the defendant Gray applied to Channell J. at chambers for an order allowing a set-off of the two judgments. The learned judge made an order allowing the defendant Gray to set off against the damages recovered from him a corresponding portion of the damages due to him on the judgment in the former action. (1)

The plaintiff Goodfellow appealed.

W. A. Metcalfe, for the plaintiff Goodfellow. The learned judge had no jurisdiction to make the order for a set-off in derogation of the charge which had been obtained by Good-

(1) It was stated that the same solicitor who had obtained the charging order acted for the plaintiff on the hearing of this application.

fellow's solicitor as long as that charge stood. Assuming that he had jurisdiction, it was an erroneous exercise of his discretion to do so. To the extent of the charge the interest of Goodfellow was transferred to his solicitor, and the charging order could not be set aside except on an application specifically made against the solicitor for that purpose.

Buckmaster, for the defendant Gray. It would obviously be most unjust that, the plaintiff Goodfellow owing a much larger sum on a previous judgment to the defendant Gray, the latter should be subject to have execution issued against him on this judgment for 40*l*. Order LXV., r. 14, allows a set off of damages notwithstanding the solicitor's lien. A charging order is only a lien given by statute. See observations of Kay L.J. in *In re Wadsworth*. (1) It has been held that the rule applies to a set-off of damages in different actions: *Blakey* v. *Latham*. (2)

W. A. Metcalfe, in reply.

A. L. SMITH L.J. This is an appeal from an order made by my brother Channell under the following circumstances. Gray sued Goodfellow and recovered judgment against him for a sum of 140*l*. He could only get satisfaction of the judgment to the extent of 20*l*., and therefore it remained unsatisfied as regards the balance of 120*l*. That being so, Goodfellow subsequently brought an action for slander against Gray in which he recovered judgment for 40*l*. damages. Goodfellow's solicitor thereupon obtained from my brother Channell ex parte a charging order upon the amount recovered by the last-mentioned judgment for his costs. Gray then applied to the learned judge for an order for a set-off of the two judgments under Order LXV., r. 14, which provides that "a set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." The learned judge held that he had jurisdiction to order a set-off of the damages, but did not order that the costs should be set off, acting upon authority to the effect that such a set-off may be allowed in respect of damages, but not in respect of costs, in different actions. In

(1) (1886) 34 Ch. D. 155. (2) (1889) 41 Ch. D. 518.

C. A. 1899

GOODFELLOW v. GRAY.

A. L. Smith L.J.

Blakey v. *Latham* (1) Kay L.J. held that the set-off of damages mentioned in Order LXV., r. 14, must mean a set-off of damages in different actions, but held upon the previous authorities that the rule did not apply to a set-off of costs in different actions. It seems to me that the learned judge was right in holding that the rule must apply to damages in different actions, and therefore he had jurisdiction to allow a set-off of the damages recovered in the two actions respectively. It is obvious that as between the parties it was eminently just that this should be done. The question is whether the existence of the charging order prevented it from being done. The rule itself expressly says that the order for the set-off may be made notwithstanding the solicitor's lien for costs. It was urged that a charging order is different from a solicitor's lien. I do not see any substantial difference for this purpose between a lien on the damages recovered by a judgment and a charging order on such damages; and again, with regard to this I would refer to what Kay L.J. said in *In re Wadsworth.* (2) He said in that case: "If the first solicitor had conducted the case to trial and recovered the fund he would have been entitled to have a charge for all his costs of the action upon that fund. That is a lien given to him quite independently of any statute by the practice in equity, and also I believe at common law." In my opinion my brother Channell had jurisdiction to make the order which he made, and exercised that discretion rightly.

VAUGHAN WILLIAMS L.J. I agree, although I have entertained some doubt on the matter, and do not think it quite so clear as my brother A. L. Smith does. I agree that it is clear that the set-off of damages mentioned by Order LXV., r. 14, must mean a set-off of damages recovered in different actions, and that the authorities, such as *Edwards* v. *Hope* (3), with regard to the set-off of costs under the rule, do not apply. The question as to which I doubt is whether a case where there is a charging order under the Solicitors Act, 1860, is covered by the words "notwithstanding the solicitor's lien for costs, &c.,"

(1) 41 Ch. D. 518. (2) 34 Ch. D. 155.
(3) (1885) 14 Q. B. D. 922.

in the rule. I do not think that the making of a charging order has no effect, and leaves the solicitor with his lien and nothing more; for s. 28 of the Solicitors Act, 1860, after saying that the Court or judge may declare the solicitor entitled to a charge upon the property recovered or preserved, provides that, upon such declaration being made, he shall have a charge upon and a right to payment out of that property, and all conveyances and acts done to defeat such charge or right, unless made to a bonâ fide purchaser for value without notice, shall be void as against such charge or right. In the case of *In re Wadsworth* (1) Kay L.J. says with regard to the effect of a charging order that "An order like a charging order is, for this purpose, in the nature of an execution, and a judgment creditor never takes anything except subject to prior equities; and, whenever he gets his judgment, and however he gets it, execution of the judgment can only be obtained subject to any prior equity which attaches on the property." At the moment when the charging order was obtained in this case, it would appear that there was no actually existing right of set-off as regards the two judgments; otherwise it would have been unnecessary for Gray to obtain the order which he did. I have felt considerable doubt whether, the solicitor having obtained the charging order previously to anything being done by Gray to obtain a set-off of the judgments, he did not obtain a right which could only be displaced by some proceeding to which he was made a party. But, on the whole, having regard to the fact that the application for the charging order is an ex parte application, I am not prepared to say that the order made on such an application is not covered by the words "notwithstanding the solicitor's lien for costs, &c.," in the rule, or that it gives the solicitor a right which defeats the primâ facie right of Gray to obtain an order for a set-off of the damages recovered in the two actions respectively.

Appeal dismissed.

Solicitor for plaintiff: *F. A. S. Stern.*

Solicitors for defendant: *Harris & Chetham.*

(1) 34 Ch. D. 155.

E. L.

C. A.
1899
July 31.

[IN THE COURT OF APPEAL.]

ROCHE *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Practice—Transfer of Action—Action under Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93)—*Decree for Limitation of Liability in the Admiralty Division—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), s. 503—*Order* XLIX., *r.* 3.

Where an action under the Fatal Accidents Act, 1846, was brought in the Queen's Bench Division by a widow against shipowners for the loss of her husband through the negligent management of their ship by the defendants' servants, and the defendants had obtained a decree in the Admiralty Division for limitation of their liability in accordance with the Merchant Shipping Act, 1894, s. 503 :—

Held, that the action in the Queen's Bench Division ought not to be transferred to the Admiralty Division.

APPEAL from the order of Lawrance J. at chambers refusing to transfer an action as after-mentioned.

The action was brought under the Fatal Accidents Act, 1846 (commonly called Lord Campbell's Act), in the Queen's Bench Division by a widow on behalf of herself and children to recover damages for the loss of her husband through the negligent management of the defendants' steamship *Stella* by the defendants' servants. The deceased lost his life in consequence of the wreck of the *Stella* on a voyage from Southampton to the Channel Islands. Other actions of the same character had been brought and claims made against the defendants in respect of the same shipwreck. The defendants had brought an action in the Admiralty Division for limitation in accordance with s. 503 of the Merchant Shipping Act, 1894, of their liability in respect of claims made or to be made against them arising out of damage to or loss of goods or merchandise on board the *Stella*, and also in respect of claims made or to be made by the legal personal representatives of persons who lost their lives by reason of the loss of the ship, and in respect of all claims arising out of any loss of life or personal injury

occasioned thereby. The defendants obtained in that action a decree limiting their liability to the sum of 15,404*l.* 8*s.*, together with interest from the loss of the ship until payment, which amount they paid into the Admiralty Division. The decree provided in the usual way that all claims were to be made before a certain date and for the reference of the claims made to the registrar and merchants. The defendants applied to Lawrance J. at chambers for an order transferring the action in the Queen's Bench Division to the Admiralty Division, but he refused the application. The defendants appealed.

R. B. D. Acland, for the defendants. This is a test case, there being other actions involving the same question. The defendants admit liability, so that the actions in the Queen's Bench Division are really undefended. The defendants' liability being limited to the amount which is now in court in the Admiralty Division, which will certainly not exceed the claims against it, it is much the most convenient course that these actions should all be transferred to the Admiralty Division, by which the fund in court will be distributed. It would be a merely useless expense that the actions should proceed in the Queen's Bench Division and the defendants be obliged to go to trial in them. [He cited *The Nereid* (1); *The Vera Cruz* (2); *Glaholm* v. *Barker* (3); *London and South Western Ry. Co.* v. *James*. (4)]

Rawlinson, Q.C., and *F. M. Abrahams*, for the plaintiff, were not called upon.

A. L. SMITH L.J. In my opinion Lawrance J. exercised his discretion correctly in this case, and, if I had been the judge at chambers, I should have decided in the same way. The action is brought in the Queen's Bench Division under Lord Campbell's Act, and the plaintiff desires to have her damages assessed by a jury as provided by s. 2 of that Act. Why should she not have them so assessed? Primâ facie a jury is the proper tribunal for assessing them, and not the registrar

(1) (1889) 14 P. D. 78.
(2) (1884) 10 App. Cas. 59.
(3) (1866) L. R. 2 Eq. 598.
(4) (1872) L. R. 8 Ch. 241.

C. A. 1899

ROCHE v. LONDON AND SOUTH WESTERN RAILWAY.

A. L. Smith L.J.

and merchants. The defendants suggest as a reason for transferring the action that it will involve them in unnecessary expense, if this and other similar actions are allowed to proceed in the Queen's Bench Division. I do not think that is made out. The defendants can let judgment go by default, and the result will be that the plaintiff must go to the sheriff's court to get her damages assessed. It does not appear to me to matter to the defendants what the amount of the damages may be, for, whatever the claims against them may be, their liability is limited to the amount paid into court in the Admiralty Division, and it is admitted that the claims will exceed that amount, so that there cannot be any salvage coming back to the defendants out of it. It seems to me that the defendants have really nothing to do with the question how the fund in court is distributed. They need not appear in the sheriff's court or defend the action. It is immaterial to them what damages are recovered by the plaintiff, as the amount in court will in any case be overtopped by the claims upon it. The plaintiff cannot get execution against the defendants for the amount which may be assessed by the sheriff's court; for they would have a right to have execution stayed on account of the decree made in the action for limitation of their liability in the Admiralty Division; and the plaintiff's only right will be, upon the distribution of the fund in the Admiralty Court, to get such proportion of it as her damages may bear to the total amount of the claims. I see therefore no hardship to the defendants in allowing the action in the Queen's Bench Division to proceed, whereas on the other hand it appears to me that it would be a hardship to the plaintiff to be relegated for the assessment of her damages to the registrar and merchants, who may be an excellent tribunal for determining the amount of damage to ship or goods, but not for dealing with a claim of the kind made by the plaintiff. Then is there any authority to shew that in such a case the action ought to be transferred? On the contrary, there is a decision to the opposite effect. In *The Nereid* (1), under the Merchant Shipping Act, 1854, s. 514, Butt J. in a

(1) 14 P. D. 78.

case of this kind stayed actions for loss of property, but refused to stay actions in respect of loss of life.

VAUGHAN WILLIAMS L.J. I entirely agree. The case of *The Nereid* (1) seems to me to be clearly an authority against the application to transfer the action in this case. It was not suggested by the counsel for the defendants that the effect of the decree in the action for limitation of liability was to take away the jurisdiction of the Queen's Bench Division to entertain this action. Therefore the question whether the action should be transferred was one for the discretion of the judge at chambers. I think upon the authorities that his discretion in this case was rightly exercised. The terms of Lord Campbell's Act contemplate that the claim under that Act shall be dealt with by a jury. The suggestion by the defendants is that it should be determined without a jury. It seems to me that that is a sufficient reason for the judge's exercising his discretion as he did.

Appeal dismissed.

Solicitors for plaintiff: *Biggs, Roche & Co.*
Solicitors for defendants: *Bircham & Co.*

(1) 14 P. D. 78.

E. L.

C. A.

1899

June 17, 24; *July* 14.

[IN THE COURT OF APPEAL.]

CHANDLER *v.* SMITH.

Employer and Workman—Compensation — Personal Injury—Partial Incapacity—Disablement from earning Full Wages at Work at which employed—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 2 (*a*).

A workman was employed as foreman in a carpet-weaving factory; his principal duty was to supervise the hands, but he also to the knowledge of his employer used to set up and adjust the machines. While adjusting a machine he received an injury necessitating the amputation of his thumb; he continued however to attend regularly to his work, only absenting himself from the factory for a sufficient time to enable him to have his hand dressed. He was incapacitated by the accident from setting up and adjusting the machines, and his work was afterwards confined to the supervision of the hands. His employer continued to pay his wages at the same rate after as before the accident; but it was admitted that, should he leave his employer's service, his wage-earning power as a foreman in any other factory would be materially decreased:—

Held, that as the workman had been prevented by reason of the accident from doing a substantial part of the work at which he had previously earned his wages, he had been disabled for two weeks from earning full wages "at the work at which he was employed" within the meaning of s. 1, sub-s. 2 (*a*), of the Workmen's Compensation Act, 1897:

Held, further, that, as the workman had hitherto suffered no pecuniary loss, the proper course was to make a declaration of the liability of the employer, leaving the amount and duration of the compensation to be fixed upon an application under Sched. I., clause 12, to vary the award, should the workman at any future time be unable by reason of the accident to earn the same wages.

Appeal from the decision of the judge of the Derby County Court upon an application for compensation under the Workmen's Compensation Act, 1897. The facts as they appeared from the judgment of the learned county court judge were in substance as follows.

The respondent, who carried on business as Thomas Smith & Son, was a carpet manufacturer in Derby, and the appellant had been in his service and that of his father for seventeen years. At the time of the accident the appellant was employed

as foreman of the weaving department, his wages being 3*l.* a week. His main duties consisted in the supervision of the hands (about sixty girls and eight or ten men) employed in that department; in addition to this he used with the knowledge of the respondent to set up and adjust the machines when, as frequently happened, the fitter employed for that purpose was for any reason unable to do the work; he also used to cut the cards for, and set up the work upon, the Jacquard frames. On November 3, 1898, one of the machines was out of order, and, the fitter being unable to make it work, the appellant's attention was called to it by the weaver; while the appellant was oiling the spring and the shuttle, the weaver by mistake started the machine with the result that the appellant's thumb was caught and almost entirely severed. The appellant was taken to the infirmary, where his thumb was amputated; he then returned to his work, but went home at midday, and did not return to work that afternoon. The next day he returned to his work, and thenceforth was at the factory every day during working hours, except that from time to time for the next four weeks he paid visits to the infirmary during working hours for the purpose of having his hand dressed, being absent between one and two hours on each occasion. The learned county court judge found that if in law the respondent would have been entitled to deduct wages for the time the appellant was not at the factory, but was attending at the infirmary, he would have been entitled to deduct 10*s.* for the first week, and 7*s.* for each of the three following weeks. Since the accident the appellant had been unable to set up or adjust the machines or to cut the cards for, and set up the work upon, the Jacquard frames, and this part of the work had been done by other men. The appellant's work had since the accident been confined to supervising the staff in the weaving department, but he had been regularly paid the same wages of 3*l.* a week that he received before the accident, and the respondent stated (and, as the county court judge found, in good faith) that he had no intention of parting with the appellant, and that he considered his time better employed in supervising the hands than in setting up or adjusting the

C. A. 1899

CHANDLER v. SMITH.

machines or frames. It was admitted for the purposes of the case that the wage-earning power of the appellant as foreman in any factory where he might seek employment, should he leave the respondent's service, was materially decreased. The respondent contended that there was no evidence that the appellant had been disabled for a period of two weeks from earning full wages at the work at which he had been employed, within the meaning of s. 1, sub-s. 2 (*a*), of the Workmen's Compensation Act, 1897, and that he was entitled to no compensation because he was earning, and was able to earn, in his present employment the same wages that he was earning before the accident. The learned county court judge found that the wages for the week of the accident and the following weeks were paid not as matters of grace but in performance of the contract of service, that the appellant had not been disabled for a period of two weeks from earning full wages at the work at which he was employed, and that therefore the Act did not apply. (1)

Parfitt, for the appellant. There was no evidence on which the learned county court judge could properly find that the appellant was not disabled for two weeks from earning full wages at the work at which he was employed. The appellant was, as the result of the accident, permanently disabled and prevented from doing a substantial part of the work that he did before the accident, and therefore full wages were not earned by him at the work at which he had been employed. The important words of s. 1, sub-s. 2 (*a*), are, "at the work at which he was employed," and it cannot be contended upon the facts that after the accident the appellant's wages were earned at the same work as that at which he was employed before the accident. The accident clearly affected the appellant's capacity as a wage-earning machine, as it was admitted that if he left the respondent's service he would not be able to earn such high

(1) By 60 & 61 Vict. c. 37 (The Workmen's Compensation Act, 1897), s. 1, sub-s. 2 (*a*): "The employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed."

wages. It was a mere accident that the respondent chose to go on paying the appellant at the rate of 3*l.* a week, and there was nothing to justify the finding of the county court judge that this was not done as a matter of grace.

Hextall, for the respondent. There was ample evidence to justify the findings of the county court judge. The appellant's wages were paid, both before and after the accident, in respect of his superintendence of the hands, the work done by the appellant upon the machines being incidental and practically voluntary. The finding of fact that the 3*l.* were paid as wages is binding upon this Court, and there was evidence upon which the county court judge could properly find that it was not an eleemosynary payment. The appellant sustained no damage in his capacity of a wage-earner, and has therefore no claim for compensation under the Act. [He cited *Irons* v. *Davis*. (1)]

Parfitt, in reply. The county court judge has only considered whether the appellant is getting the same wages as before; he has not considered whether he is getting them at the same work as before the accident. The appellant is not being paid 3*l.* a week in respect of the performance of the same duties; the finding of the county court judge is therefore irrelevant.

Cur. adv. vult.

July 14. The following written judgments were delivered :—

A. L. SMITH L.J. The question is whether, when a workman by reason of an accident arising out of and in the course of his employment has had his right thumb cut off and has thereby become a mutilated and injured man for life, he is prevented from obtaining compensation from his master under the Workmen's Compensation Act, 1897, by reason of s. 1, sub-s. 2 (*a*), of that Act, which sub-section runs thus: "Provided that the employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed." It was proved that the injured workman at the time of the accident was in the service

(1) Ante, p. 330.

C. A. 1899

CHANDLER v. SMITH.

A. L. Smith L.J.

of the respondent at a weekly wage of 3*l.*; that his duties consisted in part of adjusting machinery and in part of general supervision over the other employees of his master; that in the course of this employment he met with the injury complained of; that for the two weeks after the accident he continued to give supervision, but was unable by reason of the loss of his thumb to adjust machinery; that he was absent from his work for short periods in order to have his injury dressed at the hospital, and that his master nevertheless continued to pay him the weekly wage of 3*l.* The difficulty in this case arises from the finding of the learned county court judge, who has found that the wages for the week of the accident and for the following weeks were paid not as matters of grace, but in the performance of the contract of service, and that the appellant had not been disabled for a period of at least two weeks from earning full wages at the work at which he was employed.

The meaning of s. 1, sub-s. 2 (*a*), in my judgment is that if the accident be of such a nature that the man is by law entitled during the two weeks immediately following the accident to recover full wages from his master at the work at which he was employed as before the accident, then such an accident is not to give rise to a claim by the workman against his master under the Act. The meaning of this sub-section is well exemplified by the maxim, "De minimis non curat lex." If the master out of feelings of compassion and generosity, which happily is often the case, continues to pay the full wages though not under legal obligation to do so, that does not bring the case within the sub-section. We have ever held that a finding of fact by a county court judge binds us, and that it is only on a matter of law that there is an appeal; but if a learned county court judge decides a fact when there is no evidence upon which he could properly find it, this is a matter of law, for in such a case he has misdirected himself, and this is law. Now where is the evidence that a man, maimed and mutilated for life by the loss of his thumb, is by law entitled to recover from his master the same wage as he could have recovered before he was so mutilated? And, indeed, the evidence in the

present case is that the workman was disabled from performing part of the work for which he theretofore was entitled to receive 3*l.* per week, and that he had also to absent himself from his work during portions of the time which he should otherwise have been working for his master to entitle him to earn the 3*l.*; and, moreover, the master had to employ another workman at an extra wage to do the work upon the machinery which the injured workman theretofore had to do. In my judgment there was no evidence that the workman could at law have exacted from his master the full wage to which he had been entitled before the accident, and, indeed, he could not have done so, and consequently there is no evidence that the payment of the full wage was not an act of grace of the master, as found by the learned judge.

For these reasons I am of opinion that the appeal of the workman must be allowed with costs here and below, and I think that the case must go down to the learned county court judge to assess the amount of compensation to which the appellant is entitled; but as my brethren think that the assessment of damages should be postponed as mentioned by them, I will not disagree with them as to this.

RIGBY L.J. The only question arising on this appeal is whether the county court judge was right in holding this to be a case to which the Workmen's Compensation Act, 1897, does not apply, on the ground that the appellant was not disabled for a period of at least two weeks from earning full wages at the work at which he was employed.

William Chandler, the appellant, had been for many years in the employ of the respondent, who traded as Thomas Smith & Son, as foreman of the weaving department. The terms on which he was employed are not in dispute. He had to mount or set up every machine in his department, and if anything went wrong he had to adjust it, if the single fitter employed could not make the machine right. He also had to cut and put into the Jacquard machines all the pattern cards, and had the general supervision of the weavers. For all this he received wages at the rate of 3*l.* a week. On November 3, 1898, while

C. A. 1899

CHANDLER v. SMITH.

Rigby L.J.

adjusting a machine that was out of order, being as is admitted work for which he was employed, he had his thumb lacerated and torn so that it had to be amputated; and it is admitted that he is now unable to set up or adjust a machine or so quickly to cut the cards for and set up work on a Jacquard frame, and that consequently his wage-earning power as such foreman as aforesaid in any factory where he might seek employment, should he leave the respondent's service, is materially decreased. He is however, and from the date of the accident, with the exception of short absences for the necessary purpose of attending at the infirmary to have his wound dressed, always has been, as capable of doing the work of superintending the weavers as he was before.

Since the day of the accident the appellant has received for each and every week the amount of his full wages, namely, 3*l.* a week. The respondent states that he has no intention of parting with the appellant, but he has had to employ an additional fitter to adjust the machines, and when work requires to be set up in a Jacquard frame a certain weaver is taken from other work for the purpose.

In this state of things the learned county court judge has found that the wages for the week of the accident and for the following weeks were paid, not as matters of grace, but in performance of the contract of service. If this means that the employer was bound by the contract to go on paying him his full wages until notice was given determining the contract, it may be true, subject to the right to a deduction for any time during which he was absent from work—a deduction which the county court judge has fixed at 10*s.* for the first week and at 7*s.* for each of the following three weeks; but, however this may be, I cannot agree with the learned judge that the appellant has not been disabled for a period of at least two weeks from earning full wages at the work at which he was employed at the time of the accident. Ever since the date of the accident he has been absolutely disabled from doing a substantial part of the work which at the time of the accident he was employed to do, and the disability seems likely to be permanent. Clearly the employer was under no legal, whatever may have

been the moral, obligation to retain him in his service at full wages under the altered circumstances. In my opinion the disability referred to in s. 1, sub-s. 2 (*a*), of the Act cannot depend upon the greater or smaller liberality of the employer; it must be a physical disability, and must depend upon the question whether the workman is capable of performing the work at which he was employed at the time of the accident as efficiently as he did before. In a case like the present, where a substantial part of the work cannot be done at all, the exception introduced by s. 1, sub-s. 2 (*a*), does not apply.

I concur in the judgment about to be delivered by Vaughan Williams L.J. as to the course that ought to be pursued.

VAUGHAN WILLIAMS L.J. I agree in the result. It is contended in this case in answer to the claim for compensation that the injury sustained by the workman did not disable him for a period of at least two weeks from earning full wages at the work at which he was employed; and, further, that the appellant is entitled to no compensation because there has been no difference between the amount of his average weekly earnings before the accident and the average amount which he has been able to earn since the accident, even assuming that it can be truly said that there has been a period of partial incapacity for work.

Now, s. 1, sub-s. 2 (*a*), of the Workmen's Compensation Act, 1897, provides that the employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed. The workman in the present case was employed at a wage of 3*l.* a week in a weaving factory as a foreman. As such foreman he was required to supervise the work of the female machinists, and to adjust and oil the machines in cases where the machinist required assistance. The result of the accident was that the workman lost his thumb and can no longer do the whole of the work of adjusting and oiling the machines; but he can still do so much of his former work as consisted of supervising the work of the female machinists, and he has ever since the accident been

C. A. 1899

CHANDLER v. SMITH.

Vaughan Williams L.J.

continued as a foreman, and has received 3*l.* a week as before the accident.

Now, the fact that the workman has been paid full wages as before the accident does not conclusively shew that he has not been disabled from earning full wages at the work at which he was employed, because part of the wages which he has received may not have been earned by him, but may have been paid to him as an act of grace, notwithstanding the fact that the loss of his thumb might disable him from earning as much as 3*l.* a week as the market value of his services as foreman now that he has lost his thumb, the proof of this being that he could not earn so much if he had to go elsewhere to find employment as a foreman. The county court judge has found as a fact that the wages received by the workman ever since the accident were paid, not as matters of grace, but in performance of the contract of service.

The contract in the present case is a contract by the week, and the fact that the master chooses to re-engage the workman at the end of each week at the old wage is some evidence that the master considers the workman worth that wage notwithstanding the loss of his thumb. This is a very different thing from the master refraining from making a deduction from the wages of a workman employed under a continuous contract for a year or other period exceeding two weeks, notwithstanding the partial incompetence of the workman to do the whole of his work as formerly by reason of the loss of a thumb resulting from accident.

The importance of this is that we are bound by the "findings in fact" of the county court judge if there is any evidence to support them, and it seems difficult to me to say that the re-engagement at the end of each week is not some evidence that the master considered the workman to be worth the full wage of 3*l.* a week notwithstanding the loss of his thumb. In such a case I should hesitate to say that the re-engagement was no evidence that the man's services were worth the old wage notwithstanding the fact that there was some of the work formerly done by the workman which by reason of the accident he was no longer able to do; but in the present case my hesita-

tion is increased by the fact that the adjusting of the machines does not seem on the evidence to be essential to the work of a foreman, although it happened to be included in the work habitually done by this particular foreman.

Assuming that this difficulty of the finding of the county court judge is got over, there still remains the difficulty that the county court judge by his judgment orders that the appellant do recover nothing from the respondent as compensation; that is, as compensation for the personal injury which is alleged to have resulted in the partial incapacity of the workman for work. Now Sched. I., clause 1 (*b*), gives, together with clause 2, the measure of compensation. Those clauses run thus: "Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound. In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity." Now this measure will give the workman nothing unless it can be truly said that there is a difference between the amount of the average weekly earnings of the workman before the accident and the amount which he is able to earn after the accident, regard being had to any payment, not being wages, which he may receive from the employer in respect of his injury during the period of his incapacity. I cannot see how any difference can be arrived at, having regard to the statutory definition of the measure, and I cannot say, therefore, that the judgment of the county court judge is wrong as far as it goes in awarding nothing to the appellant; but, having regard to the provision in s. 1, sub-s. 1, of the Act that the employer shall be liable to pay compensation if in any employment personal injury, by

C. A. 1899

CHANDLER v. SMITH.

Vaughan Williams L.J.

accident arising out of and in the course of the employment, is caused to a workman, and to the provisions in s. 1, sub-s. 3 that the question of liability as well as the question of the amount or duration of compensation is to be settled by arbitration, it seems to me that the county court judge in this case might and should have made a declaration of liability and adjourned the question of the amount and duration of compensation. This seems to me to be in accordance with the spirit of the provisions of clause 12 of Sched. I., which provides that the weekly payment may be reviewed at the request either of the employer or of the workman, and on such review the weekly payment may be ended, diminished, or increased. If you may review the award when the facts have been ascertained for certain, it seems only reasonable that you may postpone the fixing of the amount of compensation until the facts are ascertained to which the measure is to be applied, and I prefer this course to that of awarding a weekly payment of a penny and then applying the provisions of clause 12 of Sched. I.

Appeal allowed.

Solicitors for appellant: *Warriner & Co., for J. T. Wykes, Derby.*

Solicitors for respondents: *Hind & Robinson, for Wells & Hind, Nottingham.*

W. J. B.

In re BULLOCK.
Ex parte WARD.

1899
July 10.

Bill of Sale—Validity—Covenant to Produce "when called upon" last Receipt for Rent, Rates and Taxes—Power to Seize on Breach of any Covenant—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9.

By a bill of sale the grantor covenanted (inter alia) to produce "when called upon" the last receipt for the rent, rates and taxes of the premises where the chattels were; and the deed provided that the chattels thereby assigned should not be liable to seizure or to be taken possession of by the grantee for any cause other than those specified in s. 7 of the Bills of Sale Act, 1882 (the section being set out); and then followed a further proviso that if the chattels thereby assigned should be seized or taken possession of by the grantee "in consequence of the breach of any of the covenants therein contained," he should be at liberty to sell the same. The trustee in bankruptcy of the grantor contended that the bill of sale was void because the second proviso enabled the grantor to seize on non-production of receipts for rent, &c., on an oral demand, whereas the Act requires the demand to be made in writing:—

Held, that the deed considered as a whole substantially complied with the provisions of the Act, and was valid.

THIS was a motion that raised a question as to the validity of a bill of sale.

By a bill of sale dated September 17, 1897, and made between R. G. Bullock, a cab proprietor, of the one part, and W. Silverton of the other part, R. G. Bullock assigned all his horses and cabs, and some furniture, to W. Silverton as security for the sum of 385*l.* 10*s.*, to be repaid by monthly instalments with interest as therein mentioned; and R. G. Bullock agreed with W. Silverton to pay the said sum of 385*l.* 10*s.* by monthly instalments with interest as aforesaid; and to keep the said chattels insured against loss or damage by fire; and to pay the rent, rates and taxes payable by him in respect of the premises in which the said chattels were; and also when called upon by the said W. Silverton to produce to him the policy of insurance and the receipt for the last

1899

BULLOCK, *In re.* WARD, *Ex parte.*

premium and the last receipt for such rent, rates and taxes: provided always, that the chattels thereby assigned should not be liable to seizure or to be taken possession of by the said W. Silverton for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, that was to say:—

"1. If the said R. G. Bullock shall make default in payment of the sum and interest hereby secured at the times and in manner herein provided for payment or in the performance of any covenant or agreement herein contained and which is necessary for maintaining the security.

"2. If the said R. G. Bullock shall fraudulently either remove or suffer the said goods or any of them to be removed from the premises.

"3. If the said R. G. Bullock shall become bankrupt or suffer the said goods to be distrained for rent, rates or taxes.

"4. If the said R. G. Bullock shall not, without reasonable excuse, upon demand in writing by the said W. Silverton produce to him the last receipts for rent, rates and taxes.

"5. If execution shall have been levied against the goods of the said R. G. Bullock under any judgment at law.

"Provided further, that if the said horses or cabs, chattels and things hereby assigned shall be seized or taken possession of by the said W. Silverton in consequence of the breach of any of the covenants herein contained," the said W. Silverton should be at liberty to remove and sell the same as therein mentioned.

On January 3, 1898, W. Silverton took possession under the bill of sale, default having been made in the payment of a monthly instalment, and sold the horses and cabs, which realized 243*l.* 10*s.*

On January 4, 1898, a receiving order was made against R. G. Bullock and adjudication followed, and one Ward became the trustee in the bankruptcy.

The trustee claimed the 243*l.* 10*s.* in the hands of W. Silverton on the ground that the bill of sale was not made in

accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882.

Haldinstein, for the trustee. The covenant to pay the rent, rates and taxes in respect of the premises is necessary for the maintenance of the security. The bill of sale is void because it confers a power to seize on breach of the covenant to produce the last receipt for rent, rates and taxes "when called upon." That may be an oral demand. But the Act requires a demand in writing and provision for non-production on reasonable excuse. The power, therefore, to seize on breach of a covenant not in accordance with the form required by the statute vitiates the deed: *Davis* v. *Burton* (1); and the reference to s. 7 of the Act in the preceding proviso does not cure the defect: *In re Williams*. (2)

Reed, *Q.C.*, and *Salter*, for Silverton. This deed is a common form and is perfectly valid: *Weardale Coal and Iron Co.* v. *Hodson* (3) and *In re Paxton* (4) are in point. In each of those cases the power to seize was not exactly in accordance with the statute, but the deed was held to be valid.

[They also referred to *Topley* v. *Corsbie* (5); *Turner & Co.* v. *Culpan* (6); *Cartwright* v. *Regan* (7); *Hammond* v. *Hockin*. (8)]

Haldinstein, in reply. None of the cases cited are directly in point. In *Weardale Coal and Iron Co.* v. *Hodson* (3) the power to seize was after "demand in writing," and in the case of *In re Paxton* (4) the power was not greater than is allowed by the Act. The deed is not in a common form because it is not in the form required by the Act.

WRIGHT J. I think this is a very ordinary and unobjectionable form of deed. I think I have seen it often before and that it is one in common use. But that, of course, will not make it a good bill of sale if the decisions say it is bad. The question is whether the second proviso in the deed for seizure

(1) (1883) 11 Q. B. D. 537.
(2) (1883) 25 Ch. D. 656.
(3) [1894] 1 Q. B. 598.
(4) (1889) 60 L. T. (N.S.) 428.
(5) (1888) 20 Q. B. D. 350.
(6) (1888) 36 W. R. 278.
(7) [1895] 1 Q. B. 900.
(8) (1884) 12 Q. B. D. 291.

1899

BULLOCK, *In re.* WARD, *Ex parte.*

Wright J.

on breach of any of the covenants vitiates the deed as being a power to seize and sell whenever there is default in the production of a receipt for rent, rates and taxes, although there may be a reasonable excuse and no demand in writing has been made. I do not see that that is the meaning of the deed at all. It seems to me that, reading the document reasonably, the second proviso for seizure ought, as regards non-production of receipts for rent, rates and taxes, to be read as subject to the fourth sub-clause in the first proviso, namely, "if the said Robert George Bullock shall not without reasonable excuse upon demand in writing by the said William Silverton produce to him the last receipt for rent, rates and taxes." What is the use of incorporating the provisions of s. 7 of the Act in the deed unless it is intended to cover the more general words of the second proviso? It seems to me that that was the view of Cave and Charles JJ. in the case of *In re Paxton.* (1) I think, therefore, that on this point the bill of sale is good.

Solicitor for trustee: *F. W. Henry.*
Solicitor for respondent: *A. Slater.*

(1) 60 L. T. (N.S.) 428.

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.
1899
June 10.

APPLEBY AND OTHERS *v.* THE HORSELEY COMPANY, LIMITED, AND LOVATT.

Employer and Workman—Compensation—Injury to Workman resulting in Death—Average Weekly Earnings—Break in Employment—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I. Clause* 1 (*a*), (i.)—*Indemnity as between Respondents—Undertakers and Contractor—Notice of Claim—Workmen's Compensation Act*, 1897, *s.* 4—*Workmen's Compensation Rules*, 1898, *rr.* 19–23.

A workman met with an accident which incapacitated him from work for eleven months; he then went back to work with the same master, being employed on a different class of work and at lower wages. About eighteen months after resuming work he met with a fatal accident arising out of and in the course of his employment:—

Held, that, in ascertaining the workman's average weekly earnings for the purpose of assessing the compensation payable to his dependants under Sched. I., clause 1 (*a*), (i.), of the Workmen's Compensation Act, 1897, regard could only be had to the period of employment between his return to work and the date of the accident, and that, this period being less than three years, the amount of compensation was 156 times his average weekly earnings during that period:

Held, further, that where the undertakers and a contractor with them are made respondents to an application for compensation under the Act, and the undertakers claim under s. 4 of the Act to be entitled to an indemnity against the contractor, they must, under rule 23 of the Workmen's Compensation Rules, 1898, file a notice of their claim five clear days before the day of hearing in the same manner as is prescribed by rule 19 in the case of a claim for indemnity by a respondent against a third party.

APPEALS from a decision of the judge of the Leicester County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The application was made by the widow and children of a workman who was killed by an accident which happened to him while in the employment of the appellants, the Horseley Company. The facts were shortly as follows:—

In September, 1898, certain alterations were being carried out at the Leicester Station of the Midland Railway; the contractor for the works was the respondent Lovatt; the

C. A. 1899

APPLEBY v. HORSELEY COMPANY.

Horseley Company were the sub-contractors for the bridge-work and the iron-work. On September 27 Appleby, a workman in the employ of the Horseley Company, was killed by an accident arising out of and in the course of his employment upon the works. Both the Horseley Company and Lovatt were made respondents to the application for compensation. Upon the hearing it appeared that the deceased had originally been in the employ of the Horseley Company as a rivetter at the wages of 2*l.* 10*s.* a week. In March, 1896, he met with an accident which incapacitated him from work for eleven months, during which period he earned no wages, though he was not actually dismissed from the company's service. In February, 1897, he commenced to work again for the Horseley Company as a timekeeper and storekeeper at 1*l.* 10*s.* a week, and remained so employed at those wages until his death.

The county court judge held that, in assessing the amount of compensation under Sched. I., clause 1 (*a*), (i.), the average weekly earnings of the deceased were to be arrived at by taking into account his wages earned as a rivetter before the break in his employment as well as those earned by him as a timekeeper after he went back to work, and awarded the sum of 269*l.* 15*s.* as compensation, an order for payment of that sum being made against both the Horseley Company and Lovatt. From this order the Horseley Company appealed.

An application was made at the hearing to the county court judge on behalf of Lovatt for an order for an indemnity against the Horseley Company under s. 4 of the Act. It was objected on behalf of the Horseley Company that no notice of a claim for an indemnity had been given as required by the rules under the Act; but the learned judge made an order that the Horseley Company should indemnify Lovatt, from which order also the Horseley Company appealed.

McCardie, for the appellants in the first appeal. The amount awarded has been arrived at upon a wrong basis. The deceased was never dismissed from the service of the appellants, although he received no wages during his eleven months' absence, and his employment may properly be treated as being continuous;

in that case his average weekly earnings, within the meaning of Sched. I., clause 1 (*a*), (i.), (1) will be the amount actually earned during the three years prior to the accident divided by 156: this will give 177*l.* as the amount of compensation. The appellants do not, however, press this contention, and assuming that the period of eleven months is to be treated as a break in the employment, then his employment will have been less than three years, and the compensation must be calculated upon his wages during his actual employment, that is, his employment after he went back to work, and the amount will be 234*l.*, which is 156 times his weekly wages since that date. A substantially continuous employment is contemplated by the schedule, and it is therefore wrong to take the period before the break in the employment and join it to the period after the break in order to arrive at the average weekly earnings: *Jones* v. *Ocean Coal Co.* (2); that was, it is true, a decision as to the basis for determining the average weekly earnings in a claim for compensation in respect of incapacity under Sched. I., clause 1 (*b*), but the principle applies to assessment of compensation in cases of death under clause 1 (*a*), (i.), of that schedule.

McCurdy, for the respondents Appleby and others. The amount is to be calculated upon the average weekly earnings during a period of actual continuous employment under the same employer. In the present case it is admitted that the

(1) By the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), Sched. I., clause 1, "The amount of compensation under this Act shall be

"(*a*) Where death results from the injury—

"(i.) If the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer."

(2) Ante, p. 124.

C. A. 1899

APPLEBY v. HORSELEY COMPANY.

deceased was not dismissed after his first accident, although payment of wages ceased; the relationship of master and servant remained unbroken, and the amount cannot, therefore, be calculated solely upon the wages earned after the deceased came back to work. But inasmuch as "employment" means something more than the mere relationship of master and servant, the period of absence from work must be excluded, and the proper basis of calculation is to take into consideration the periods before and after the eleven months' absence from work. *Jones* v. *Ocean Coal Co.* (1) is distinguishable, for in that case the relationship of master and servant had absolutely ceased and a new contract of employment had been entered into. By s. 1 of the Interpretation Act, 1889, the singular includes the plural, and the county court judge rightly read the word "period" in the schedule to the Act of 1897 as "periods." [He also cited *Price* v. *Marsden* (2); *Keast* v. *Barrow Hæmatite Steel Co.* (3)]

A. L. SMITH L.J. The question for us on this appeal is how under circumstances such as those before us compensation is to be assessed under the Workmen's Compensation Act, 1897, where the accident results in the death of the injured workman. In the present case the deceased had been in the employment of the appellants from September 27, 1895, to March 16, 1896, when he met with a serious accident, which caused him to remain away from work for eleven months; at the end of that time he came back to his employers and asked to be taken on again; he was taken on, not as a rivetter, in which capacity he had been earning 2*l.* 10*s.* a week, but in a different capacity, with wages of 1*l.* 10*s.* a week. On these facts, and upon the evidence given, I am clearly of opinion that there was a break of employment during the period of eleven months' absence, and that the relationship of master and servant cannot properly be said to have existed during that period.

In February, 1897, the deceased went back to work upon

(1) Ante, p. 124. (2) [1899] 1 Q. B. 493.
(3) (1899) 15 T. L. R. 141.

new terms of service, and remained at work on those terms till the fatal accident on September 27, 1898, and we must now determine how the compensation for his widow and children is to be assessed. It is suggested that if the deceased is to be taken to have been in continuous employment for the three years preceding his death, the compensation payable would be only 177*l.*, his actual earnings during that period; but this view is not insisted upon by the appellants, and we are not called upon to determine it. Then it is contended for the appellants that there was no continuous employment during the eleven months' absence from work, and that the only period of continuous employment that can be looked at is that from February, 1897, to September, 1898; and if that is so, the amount of compensation is 234*l.* The respondents, however, say that that is not the right mode of computation; that after taking that period, during which the deceased was earning 1*l.* 10*s.* a week, we may skip over the eleven months and take the anterior period during which his wages were 2*l.* 10*s.* a week, which brings the amount to 269*l.* 15*s.*, the sum awarded by the county court judge. The real question, therefore, is whether 234*l.* or 269*l.* 15*s.* is the right amount. My opinion, expressing it shortly, is that throughout Sched. I. the word "employment" should be read as meaning "continuous employment"; we have indeed already held in *Jones* v. *Ocean Coal Co.* (1) that that is its meaning in clause 1 (*b*), which relates to compensation in cases of incapacity resulting from the injury, and I can see no reason why it should not have the same meaning in clause 1 (*a*), (i.), which deals with compensation in cases of death. And, further, I think that the expression "period of his actual employment" can only mean a period during which the workman is in fact employed and is doing work for his employer. Reading the clause in that way, we arrive at the period from February, 1897, to September, 1898, as being the period of continuous employment during which the deceased was in fact employed by the appellants, and therefore the amount of compensation works out at 234*l.* instea d o 269*l.* 15*s.* I desire to add for myself that I do not think that

(1) Ante, p. 124.

C. A. 1899

APPLEBY v. HORSELEY COMPANY.

the county court judge was right in applying the Interpretation Act to the present case and in reading the word "period" as "periods." The appeal must be allowed.

RIGBY L.J. I agree both in the judgment of my Lord and in his concluding remark. The Interpretation Act does not, in my opinion, apply in any case where the context is against its inclusion. Here the schedule definitely speaks of "the period" and "any less period," and it is clear that the Interpretation Act can have no application.

VAUGHAN WILLIAMS L.J. I agree. I think that the employment must be continuous; indeed, this view runs through the whole schedule, and the contrast is between continuous employment for three years and continuous employment for a less period; I agree also that "actual" means "according to the fact." I desire only to add one thing, which does not affect the result of our judgment. The only point argued has been whether we are to include the two periods of employment, or to treat the intervening period of eleven months as a breach in fact in the continuity of the employment. I wish to make one observation for fear that it should be supposed that I am deciding something that I do not decide. Suppose the case of a man in an employment at a high rate of wages, and that during that employment he meets with an accident which results in his death, but not for some little time, and that meanwhile his master gives him some employment, not necessarily the same, but enabling him to earn some wages: in such a case I do not feel sure that the employment with which we should have to deal would not be the employment up to the time of the accident causing the death, and I do not wish to give any opinion as to whether the tribunal assessing the compensation should in such a case consider the employment at the lesser wage.

Appeal allowed.

McCardie, for the appellants in the second appeal. The county court judge acted without jurisdiction. No notice of a

claim for an indemnity, in accordance with rule 19, had been given on behalf of Lovatt to the appellants under rule 23 of the Workmen's Compensation Rules, 1898. Rules 19 to 23 deal with notice to parties against whom indemnity is claimed, rules 19 to 22 dealing with a claim for indemnity against a third party, and rule 23 with a claim by one respondent against another. (1) The county court judge was wrong in saying that

(1) By the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 4, "Where, in an employment to which this Act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies."

"Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section."

By rule 19 of the Workmen's Compensation Rules, 1898, "Where a respondent claims to be entitled under section 4 or section 6 of the Act or otherwise to indemnity over against any person not a party to the arbitration, he shall, five clear days before the day fixed for proceeding with the arbitration, file a notice of his claim, according to the form in the Appendix; and the registrar shall seal such notice and deliver it to the respondent, who shall serve the same, together with a copy of the applicant's request and particulars, and of the notice served on the respondent under rules 14 and 15, upon the person against whom such claim is made."

By rule 22 (2.), (*a*), if the third party admits his liability to indemnify the respondent, the judge may, with the consent of the respondent and the third party, make such award as the nature of the case may require in favour of the respondent against the third party.

By rule 23, "(1.) Where a respondent claims to be entitled to indemnity against any other respondent, a like notice may be issued and the like procedure may be adopted for the determination of questions between the respondents as might be issued and adopted if such last-mentioned respondent were a third party.

"(2.) Provided that where both the undertakers as defined by the Act and a contractor with them are made respondents to an arbitration, and it is decided in such arbitration that the contractor is liable to pay compensation under the Act, the judge may, without any consent or admission of liability on the part of such contractor, make an award in accordance with paragraph (2.), (*a*), of the last preceding rule in favour of the undertakers against the contractor."

C. A. 1899

APPLEBY v. HORSELEY COMPANY.

the notice is only obligatory under rule 19, where an indemnity is sought against a third party, and not under rule 23, where both parties are respondents; if he is right, rule 23 is useless. The word "may" in rule 23 does not enable a respondent to dispense with notice; it is permissive only in this sense, that he is at liberty to invoke the procedure of rules 19 to 22, if he desires to do so. Before rule 23 can apply, all the steps provided by rule 19 must be taken. Rule 23 is substantially similar to Order XVI., r. 55, of the Rules of the Supreme Court, which again is identical with Order XI., r. 5, of the County Court Rules; if the county court judge is right, the result is that both in the High Court and county court a defendant may without any notice apply to the judge for an indemnity against a co-defendant.

[He was stopped by the Court.]

T. Willes Chitty, for the respondent Lovatt. The county court judge was right. Rule 19 provides for the case of a third party, who must have notice of the claim for an indemnity, otherwise he would be left entirely in the dark as to the proceedings; rule 23 (1.) deals with the ordinary case of two respondents, where as a rule it is fair that one should have notice of the other's claim against him; but rule 23 (2.) deals with the cases in which both the undertakers and the contractor are made respondents and are both before the Court; in the last case there is no necessity for a notice, for by s. 4 of the Act the undertakers are given an indemnity as a matter of right against the actual employer, who is primarily liable. The language of the respective rules is different, for in the case of a third party rule 19 says that the respondent "shall" give the notice, whereas in the case of another respondent rule 23 says that he "may" give it. Rule 23 enables the county court judge to dispense with notice if he thinks it a proper case for an indemnity. The effect of the proviso in rule 23 (2.) is to except a certain class of respondents from the provisions of rule 23 (1.).

A. L. SMITH L.J. I am of opinion that this appeal also must be allowed. The point taken on behalf of the appellants,

though in a sense technical, is in fact one of substance and of considerable importance. The question for us is whether, where both the undertakers and a contractor are made respondents to an application for compensation under the Workmen's Compensation Act, the undertakers can obtain an order for an indemnity against the contractor without giving him notice under the rules of their claim to be indemnified. The right to an indemnity is given by s. 4 of the Act, which in substance provides that where the undertakers contract with any person for the execution of the work they shall be liable for accidents to the contractor's workmen, with a proviso that they shall be entitled to be indemnified by any other person who would have been liable independently of that section. The procedure for giving effect to this provision appears in the rules made under the Act. Rule 23 (1.), which deals with a claim to indemnity as between respondents, provides that a like notice may be issued and the like procedure adopted as if the respondent against whom indemity is sought were a third party; that takes us back to rule 19, which makes it obligatory on the respondent to file a notice of his claim to an indemnity five clear days before the day of hearing, and to serve it upon the third party. In my judgment rule 23 (1.) means that whether the person against whom indemnity is sought is a third party and altogether outside the proceedings, or whether he is one of the respondents, the claim for an indemnity must be started by a five days' notice under rule 19; if the indemnity procedure is invoked at all, that notice must be given. It is contended that in the case of an indemnity as between respondents, the proviso in rule 23 (2.) gives the judge power to make an order in favour of the undertakers against the contractor, whether a notice is given or not; I do not, however, agree with that contention, and I am of opinion that the notice is a necessary preliminary to any indemnity proceedings, and is the foundation of the procedure dealt with by rules 19 to 23.

RIGBY L.J. I am of the same opinion. The argument on behalf of the undertakers would have been more plausible if rule 19 had contained the words "except under s. 4"; but

C. A. 1899

APPLEBY v. HORSELEY COMPANY.

their contention is perfectly hopeless when we see that rule 19 in terms applies to a proceeding for an indemnity under s. 4 of the Act.

VAUGHAN WILLIAMS L.J. I entirely agree.

Appeal allowed.

Solicitors for appellants, the Horseley Company: *Morgan, Price & Mewburn, for Hargreave & Heaton, Birmingham.*

Solicitor for respondents Appleby and others: *B. Wilkinson, for Wykes, Leicester.*

Solicitors for respondent Lovatt: *Pritchard, Englefield & Co., for W. Maurice Williams, Leicester.*

W. J. B.

1899

June 27, 28.

[IN THE COMMERCIAL COURT.]

HYDERABAD (DECCAN) COMPANY *v.* WILLOUGHBY AND OTHERS.

Insurance, Marine—Policy—Deviation—Delay—Clause allowing Deviation at Premium to be arranged.

The plaintiffs insured with the defendants by a Lloyd's policy a box containing bullion "at and from Boodinni to London," in a P. & O. steamer, "including all risks of every description from the mines by escort to railway station at Raichur (forty miles) thence by rail (400 miles) to Bombay, thence to London." The policy contained a clause covering the assured "in the event of deviation or change of voyage at a premium to be hereafter arranged." At Raichur the station-master improperly refused to receive the box at other than owners' risk rate, and the official in charge of it took it for safety to the plaintiffs' head office at Secunderabad, 170 miles from Raichur, and off the route from that place to Bombay; the box was kept there for a month in the plaintiffs' safe while arrangements were being made with the railway company. The box was then taken to Raichur and forwarded by the prescribed route to London, where upon arrival a bar of gold was found to be missing; it had in fact been stolen while the box was in the plaintiffs' office at Secunderabad:—

Held, that the taking of the box to Secunderabad was a necessary act done in the prosecution of the insured journey, and was within the scope of the adventure; that the risk was always a transit risk; that the delay

at Secunderabad was unreasonably long, and that there was at that place an unjustifiable deviation not covered by the premium paid, but that, being a deviation in the course of the voyage, it was covered by the deviation clause in the policy, and the defendants were therefore liable.

ACTION tried in the Commercial Court by Bigham J. without a jury. The facts are set out at length in the judgment, and appear sufficiently in the head-note for the purposes of the argument.

Joseph Walton, Q.C. (*J. A. Hamilton* with him), for the plaintiffs. The taking of the box to Secunderabad was for the benefit of insurers and insured alike, and was not a deviation at all. The intention to forward it upon the insured journey was never abandoned, and the risk while the box was at Secunderabad was always a risk of transit. If what was done amounted in law to a deviation not covered by the premium paid, the plaintiffs are entitled to the benefit of the deviation clause at a rate of premium to be arranged.

Carver, Q.C. (*Scrutton* with him), for the defendants. First, the taking of the box to Secunderabad was a break in the transit, exposing the goods to a non-transit risk which was not covered by the policy. Secondly, apart from the deviation clause the plaintiffs cannot recover on this policy. The detour and delay were unreasonable, and, being for a purpose unconnected with the voyage, amounted to a deviation from the insured voyage and absolved the defendants from liability on the policy: *Burgess* v. *Equitable Marine Insurance Co.* (1); *Hammond* v. *Reid.* (2) Thirdly, the plaintiffs are not entitled to the benefit of the deviation clause, which cannot be used so as to defeat the other express conditions of the policy, one of which was at once to hand over the box to the railway company at Raichur. The doctrine of liberty to deviate subject to a premium to be arranged was applied in *Seccomb* v. *Provincial Insurance Co.* (3); but in order to come within the clause the deviation must be one connected with the original

(1) (1878) 126 Mass. 70. (2) (1820) 4 B. & A. 72.
(3) (1865) 92 Mass. 305.

1899

HYDERABAD (DECCAN) COMPANY v. WILLOUGHBY.

voyage; in the present case it was not, for it was not a step in the transit.

J. A. Hamilton, in reply. There is no condition in the policy which would be defeated by applying the deviation clause; it was not a condition that the box should be at once handed over to the railway company at Raichur; that clause merely pointed out the route by which the box was to be sent. There was no deviation at all, when the facts are properly looked at. The delay at Secunderabad was not unreasonable under the circumstances, and it is only when delay is unreasonable that it amounts to a deviation: *Phillips* v. *Irving*. (1)

Cur. adv. vult.

June 28. The following written judgment was delivered by

BIGHAM J. This was an action upon a policy of insurance to recover the value of a bar of gold alleged to have been lost by the perils insured against. There was some slight controversy about the facts, but I find them to be as follows. In March, 1898, the plaintiffs, who are owners of a gold mine at Boodinni in Central India, contemplated forwarding a parcel of gold bullion from their mines to London. The ordinary route lay, first, from the mines to Raichur, a railway station on the Great Indian Peninsula line (a distance of about forty miles), thence by rail to Bombay (a distance of 400 miles), and thence by steamer to London. On March 28, 1898, they effected the policy sued on with the defendants. The form used was an ordinary Lloyd's form. The risk was described as "at and from Boodinni to London" in a Peninsula and Oriental steamer, "including all risks of every description from the mines by escort to railway station at Raichur (forty miles) thence by rail (400 miles) to Bombay thence to London and until delivered at its destination at assay office $\frac{\text{and}}{\text{or}}$ bank in London." There was stamped in the margin of the policy the following words: "It is agreed to hold assured covered in event of deviation or change of voyage at a premium to be hereafter arranged." The bullion

(1) (1844) 7 M. & G. 325.

consisted of three bars of gold; it was packed in a small wooden box and sealed, and was sent from the mines to Raichur on March 29, 1898, in charge of Mr. Brewer, one of the plaintiffs' officials. It arrived at Raichur on March 31, and was tendered by Brewer to the station-master there for carriage to Bombay, The station-master insisted (wrongly, as it turned out) that an arrangement had already been made between the plaintiffs and the railway company that the gold should be carried "at owners' risk," and he required Brewer to sign a form, known as Form B, acknowledging that such was the case. This Brewer refused, and I think properly refused, to do, and the station-master thereupon declined to receive the box. Brewer was at this time on his way to the head office of the plaintiff company. This office is at Secunderabad, which is on the Nizam State Railway about 170 miles to the east of Raichur. Not knowing what else to do with the box of gold, Brewer determined to take it with him to Secunderabad, which he did. It was there put into the office safe and locked up. A correspondence thereupon began between the plaintiffs and the Great Indian Peninsula Railway Company as to the terms on which the box ought to be carried. This correspondence lasted nearly a month, and in my opinion the plaintiffs were unreasonably long in making their arrangements with the railway company. Ultimately, however, the box left Secunderabad, and after retracing its journey from that place to the junction of the Nizam State Railway with the Great Indian Peninsula Railway it got upon the direct route to London. It reached its destination on May 25, about a month later than it would have done if the transit had followed its ordinary course. On arrival it was found that one of the bars of gold had been abstracted from the box. I have examined the evidence connected with the loss, and I find as a fact that the bar of gold was stolen while the box was in the office of the plaintiffs at Secunderabad. The question is whether the defendants are liable to make good the loss.

Mr. Carver contends that the policy does not cover the risk at Secunderabad; he says that it was never contemplated that the gold should be taken there or kept there, that the risk

1899

HYDERABAD (DECCAN) COMPANY v. WILLOUGHBY.

Bigham J.

while there was not a transit risk at all, and that the deviation clause cannot be used so as to defeat the condition of the policy that the gold on arrival at Raichur should be handed to the Great Indian Peninsula Railway Company. I do not think these contentions ought to prevail. It is, of course, true in a sense to say that neither party contemplated that that should happen which did happen, but they contemplated and provided for the possibility of a deviation, and what took place in this case in my opinion amounted merely to a deviation. I think the going to Secunderabad was in the circumstances a justifiable deviation, if, indeed, it was a deviation at all; it was a necessary act done in the prosecution of the insured journey. If Brewer had signed Form B and parted with the box of gold and it had been lost by the carelessness of the railway company, the defendants would have had serious grounds of complaint; what Brewer did in going to Secunderabad was done in the interest, not only of the plaintiffs, but also of the defendants; it is as if a master had steered his ship out of her course in order to escape the dangers of a storm; such things have to be done as occasion arises, and though in a sense they may be called deviations, they really are merely incidents in the prosecution of the voyage. As a matter of fact, I find that going to Secunderabad was in the circumstances within the scope of the adventure. It was done in the prosecution of the adventure, and properly done in order to secure its safe accomplishment.

Then, as to the point that the risk was not a transit risk at all and, therefore, not within the policy, I think the transit lasted from March 29 to May 25, and that it was never suspended.

I have said that I think the delay at Secunderabad was unreasonably long, and it follows that I find there was at that place an unjustifiable deviation; but it was a deviation in the course of the voyage; the intention to forward the box to London was never abandoned; the most that can be said is that the plaintiffs were too long about it; the insured voyage was never given up, nor was the box ever dealt with by the plaintiffs in a way which was inconsistent with the intention to prosecute the adventure to its end. I think, therefore, that

the risk at Secunderabad was a transit risk. But the unreasonable delay there amounted to a deviation not covered by the premium paid. What then? The deviation clause in the policy comes into operation, and the underwriters are entitled to a reasonable additional premium. Mr. Carver says that the deviation is not covered because it is a deviation which defeats a term in the policy, namely, that on arrival at Raichur the goods are to be delivered at once into the hands of the railway company. I do not, however, find such a condition. The terms of the policy point out the route to be followed, but possible deviations are contemplated and provided for; the deviation in this case was in my opinion one of them, and it follows that the underwriters must pay. There will be judgment for the plaintiffs with costs. The parties must settle between themselves what premium is reasonable in respect of the excessive delay at Secunderabad.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Clements, Williams & Co.*
Solicitors for defendants: *Thomas Cooper & Co.*

W. J. B.

C. A.
1899
July 4;
Aug. 11.

[IN THE COURT OF APPEAL.]

THE QUEEN on the Prosecution of MILLER and Others *v.* THE COUNTY COUNCIL OF GLAMORGAN.

Local Government—County Council—Troops summoned to preserve the Peace—Expenses of Maintenance—Liability—Mandamus.

Troops were brought into a county, on the application of the county magistrates, for the purpose of suppressing riots, and preserving peace and order in the county. By agreement with the magistrates certain tradesmen supplied the troops with food and lodging while quartered in the county.

On an application for a mandamus to the county council to pay for the food and lodging supplied:—

Held, affirming the judgment of the Divisional Court, that no duty was imposed by law on those who administered the county funds to pay the expenses of the maintenance of the troops, and a mandamus could not be granted.

Appeal from a judgment of a Divisional Court, reported ante, p. 26.

An order had been granted, calling on the county council of Glamorgan to shew cause why a writ of mandamus should not issue commanding the county council to pay to the prosecutors, out of the county fund, certain sums of money, amounting altogether to 2703*l.* 17*s.* 4*d.*, for the expenses of housing and maintaining soldiers, who had been brought into the county from Devonport, in pursuance of a resolution of the county magistrates, for the purpose of suppressing riots and disturbances connected with a strike of miners in South Wales, and of preserving peace and order in the county. Serious riots took place on May 26, 27, and 28, 1898, and on May 29 the magistrates held a meeting, and, after consultation with the police authorities, resolved to call in the assistance of the military. Arrangements were made on behalf of the magistrates for the maintenance of the troops called in, and in pursuance of these arrangements the prosecutors supplied food and lodging to the soldiers for a considerable time. The

accounts were certified by the magistrates, and were sent in to the county council, but, a dispute having arisen as to the amount, the county council refused to pay anything, whereupon an order nisi for a mandamus was moved for and obtained.

The Court (Wills, Darling, and Channell JJ.) discharged the order nisi. (1)

The prosecutors appealed.

July 4. *Sir R. Finlay, S.-G.*, and *S. G. Lushington* (with them *C. A. Russell, Q.C.*, and *H. Sutton*), for the prosecutors. The justices as conservators of the peace had authority to incur these expenses, and the county council are bound to raise a rate to meet them. It is not disputed that the expense was reasonably incurred in preserving the peace, for the justices were bound to take the necessary precautions: *Rex* v. *Pinney*. (2) The responsibility for the consequences of a riot fall on the county under 49 & 50 Vict. c. 38, and so do the expenses of special constables: 1 & 2 Will. 4, c. 41, s. 13; and of constables called in from elsewhere: Police Act, 1890 (53 & 54 Vict. c. 45), s. 25. Soldiers when called in to preserve the peace act as civilians: *Rex* v. *Kennett* (3); and as they cannot be billetted, the justices must make provision for housing and feeding them, and the expense of doing so should fall on the county as in the other cases of assistance called in. The power to make a county rate under 15 & 16 Vict. c. 81, s. 21 is, "to order and direct a fair and equal county rate to be made, for all the purposes to which the county stock or rate is now or shall hereafter be made liable by law." The words are general enough to include the making of a rate to meet the expenses necessarily authorized by the justices in performing their duty as guardians of the peace. This Act superseded 12 Geo. 2, c. 29, s. 6, in which also the power is general, for the justices are to pay the money raised by a county rate "for the uses and purposes of the said recited Acts, and for any other uses and purposes to which the public stock . . . . is or shall be applicable by law." The Local Government Act, 1888 (51 & 52

(1) Ante, p. 26.

(2) 3 State Trials (N.S.) 1; (1832) 5 C. & P. 254.

(3) (1781) 5 C. & P. 282.

C. A. 1899

REG. v. GLAMORGAN COUNTY COUNCIL.

Vict. c. 41), transferred the administrative business of the county to the county council, and with it the obligation to raise rates for all necessary purposes. The proper mode of compelling them to perform this duty is to ask for a mandamus: *Salford Corporation* v. *Lancashire County Council.* (1)

The judgment of the Divisional Court proceeds on a wrong ground, for it ignores the contract made with the prosecutors and bases the decision on some general question whether it is equitable to charge these costs on the county.

[They cited *Rex* v. *Essex.* (2)]

Asquith, Q.C., and *H. L. Stephen*, for the defendants. The question is not the general one—by whom these expenses are to be borne—but the limited one whether they can be thrown on the county. It by no means follows that because a man is appointed by the Crown to perform a duty he is to be paid the expense he incurs in so doing. In the absence of agreement or statute he must bear his own expenses as in the case of a sheriff. In the case referred to of calling out the posse comitatus this is to be at the King's cost by statute 2 Hen. 5, c. 8. Any expense to be paid out of the county rate can only be so charged by statute. The charges for sending a malefactor to gaol were by the common law borne by the vill where he was apprehended: *Mullins* v. *Surrey* (*Treasurer of*). (3) That matter was dealt with by various Prisons Acts, and the expense now falls on the county. In the preamble to 12 Geo. 2, c. 29, a great number of previous Acts are mentioned with the subject-matter of each, and in the enacting part provision is made for dealing, by a general county rate, with the expenses arising in these cases. If the expenses incurred in calling in persons to assist in keeping the peace come within that statute, the subsequent legislation is inexplicable: 41 Geo. 3, c. 78, s. 2, as to the expenses of a high constable; 1 Geo. 4, c. 37, 1 & 2 Will. 4, c. 41, and 5 & 6 Will. 4, c. 43, as to special constables; and the Police Act, 1890, would not have been required. This shews that expenses of this class were not included in the general

(1) (1890) 25 Q. B. D. 384. (2) (1792) 4 T. R. 591.
(3) (1881) 7 App. Cas. 1.

words of 12 Geo. 2, c. 29, so as to be thrown on the county rate.

Sir R. Finlay, S.-G., in reply. The argument for the respondents does not give sufficient weight to the judgment of Lord Kenyon in *Rex* v. *Essex* (1), which shews—as, for example, in the case of the repair of bridges—that the liability of the county does not arise solely by statute. The Acts referred to subsequent to 12 Geo. 2, c. 29, and relating to the preservation of the peace, did not create any new liability, but merely provided machinery for meeting the existing liability.

Cur. adv. vult.

Aug. 11. A. L. SMITH L.J. read the following judgment:—In this case the Queen's Bench Division has refused to make absolute a rule nisi for a mandamus calling upon the county council of Glamorganshire to shew cause why it should not make an order for the payment to the relators out of the county funds of the amounts expended by them for housing and feeding troops in their county, or, in the alternative, why the county council should not levy a county rate whereby to make these payments which were incurred in the circumstances hereafter mentioned.

The point is whether, when justices of the peace call in troops to aid the civil power in quelling riots in a county, there is or is not a legal duty upon the ratepayers of the county to pay for the housing and feeding of the troops so called in. Although by s. 3 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), the making, assessing, and levying of county rates, and the application and expenditure thereof, is transferred to the county councils, and by s. 9 the powers of quarter sessions and justices out of sessions with respect to county police are vested in quarter sessions and the county councils jointly, this case should be dealt with as if the powers and jurisdiction of justices of the peace for counties theretofore existing had not been affected by this Act, for in reality it has no bearing upon the case.

In the month of June, 1898, in consequence of serious riots

(1) 4 T. R. 591.

C. A. 1899

REG. v. GLAMORGAN COUNTY COUNCIL.

A. L. Smith L.J.

in Glamorganshire, it became necessary for the public safety and the preservation of the peace that troops should be imported into and kept at Aberdare, Aberavon, and Mountain Ash in that county, and the military authorities were applied to by the justices of the peace for that county for the necessary troops, which were thus obtained. These troops had to be housed and fed in the districts into which they were imported, and it therefore became necessary that arrangements should be made in that behalf, and accordingly the justices of the peace for the county in meeting assembled sanctioned these arrangements and agreed that certain ascertained payments should be made to tradesmen for housing and feeding the troops during the time they were in these districts, and the credit of the county for these agreed payments was pledged by the agents of the justices to the tradesmen who undertook to render the desired services. These tradesmen are the relators in the present application, and the law officers of the Crown appear on their behalf.

Upon July 31, 1898, the tradesmen sent in their accounts for the services rendered up to that date, made out upon the agreed prices, and these were certified as being correct by two of the justices of the peace, and there was then no dispute as to these charges. Upon September 13, 1898, the accounts of further expenditure from July 31, 1898, were sent in by the tradesmen amounting to 2500*l*; but these accounts were disputed, and the county council offered to pay 1350*l*. of this amount. This the tradesmen refused to accept; and thereupon the county council took up the position that, if the tradesmen would not take what was offered, the county council would pay nothing, and would deny its liability to pay anything, and hence the application for the rule nisi by the tradesmen, which rule was obtained, and which, as before stated, the Queen's Bench Division (consisting of my brothers Wills, Darling, and Channell) has discharged, holding that no duty is imposed upon those who administer the county funds to pay out of those funds the expenses of the maintenance of troops brought into their district for the purpose of suppressing riots.

It seems to me that the circumstances of this case are such

as to induce the Court to be astute to find, if possible, a duty imposed by law upon the ratepayers of the county to pay that which is now demanded; but the question remains, can such a duty be found? In considering this application for a rule nisi it matters not, in my judgment, whether the credit of the county has or has not been pledged by the justices to the tradesmen, for the same point arises in either case. If the justices had the power to pledge the credit of the county ratepayers to the payment of the sums now demanded by the tradesmen, it is because there is a duty upon the ratepayers to pay them; but if there be no such duty, the pledging of the credit, which the Solicitor-General much insisted upon, comes to nothing, for the point is—whether the credit was pledged or not—can the law officers of the Crown appearing for the relators shew that there is a legal duty on the part of the ratepayers of the county to pay what is now demanded by the tradesmen?

Justices of the peace for the counties are appointed by Special Commission under the Great Seal, which, as appears from Blackstone's Commentaries, vol. i. p. 351, was settled by all the judges as long ago as the year 1590. By this commission they are appointed to keep the peace in the particular counties named—viz., "to keep and cause to be kept all ordinances and statutes for the good of the peace." By 13 Hen. 4, c. 7, s. 1, it is ordered: "If any riot . . . . against the law be made in any part of the realm, that the justices of peace, three or two of them at the least, and the sheriff or under-sheriff . . . . shall come with the power of the county, if need be, to arrest them and shall arrest them"; and by 2 Hen. 5, c. 8, s. 2, the King's liege people being sufficient to travel shall be assistant to them upon reasonable warning to ride with them in aid to resist such riots upon pain of imprisonment and to make fine and ransom to the King; and by this section it is further enacted that "the said justices, and other officers, aforesaid, shall execute their offices aforesaid, at the King's costs, in going and continuing in doing their said offices, by payment thereof to be made by the sheriff of the same county for the time being, by indentures betwixt the sheriff and justices and other officers aforesaid to be made of the payment

C. A. 1899

REG. v. GLAMORGAN COUNTY COUNCIL.

A. L. Smith L.J.

aforesaid, whereof the sheriff upon his account in the Exchequer may have due allowance." From this statute it would seem that the Crown rather than the county is liable for expenses incident to the quelling of riots; but I have not to decide as to the Crown, and the subsequent Police Acts play an important part in this matter.

I do not doubt that it is the duty of justices of the peace in counties to quell riots within their respective counties, and, indeed, if they neglected to do so, they might be proceeded against by information—see *Rex* v. *Pinney* (1) and *Rex* v. *Kennett* (2)—but the question is, Who is to pay for the performance of this duty? The argument on the part of the county council is that if justices are willing to undertake duties which they are bound to perform, and expense is thereby incurred, the justices who undertake the duties must pay the expense incurred in their performance, unless they can shew that they are relieved therefrom, or that the obligation to pay is cast upon some other person or persons, which is the same thing. Upon the present rule nisi I have not to determine whether the justices who pledged the credit of the county can or cannot be sued personally for having represented to the tradesmen that they had the authority of the county to pledge its credit, whereas they had not, and I say nothing as to this one way or the other, nor have I to determine whether the Crown is the paymaster, for the sole question I have to solve is whether there is a legal duty upon the ratepayers of the county to pay to the tradesmen their accounts for housing and feeding the troops in the present case. I do not doubt that in cases of necessity justices of the peace have power to call in troops, and it is clear that, when called in to quell a riot, they can only be called in to act either as civilians or as soldiers. In my judgment they are called in to act as soldiers, for their services are asked for as being soldiers, they come as soldiers under arms and military command, they remain under arms and military command, and depart under arms and military command; but, as this is not conceded, I will first assume that they are called in to act as civilians, and see how the matter then stands.

(1) 5 C. & P. 254. (2) 5 C. & P. 282.

In Burn's Justice of the Peace, 30th ed. vol. i, p. 1340, I find it stated that "the expenses to which counties are liable, and which are to be levied by county rates, are provided for by various Acts of Parliament passed from time to time, which will be found under their respective titles throughout this work." In 1739 the statute 12 Geo. 2, c. 29, was passed, which was the first County Rate Act. Prior to this Act there had been in counties particular rates for particular purposes levied under particular Acts, and the county rate created by the Act of 12 Geo. 2, c. 29, which recites these Acts, represented the aggregate of the small rates previously levied, and it is enacted by ss. 1 and 6 that a county rate should thereafter be levied "for the uses and purposes of the said recited Acts, and for any other uses and purposes to which the public stock of any county . . . . is or shall be applicable by law." I can find no trace of the public stock of any county being liable for the housing of troops called in to quell riots either before or after the passing of this Act of 12 Geo. 2. I have looked through the Acts which relate to the county rates, both those cited in Burn's Justice of the Peace, at p. 1340, and others cited at the bar, and there is not a single Act which casts the housing and maintenance of troops when called into a county upon the county rate, and the Act of 41 Geo. 3, c. 78, s. 2, to which I shall refer hereafter, is the only Act I can find which can by any possibility be pointed to as having any semblance of a reference to the matter. The Acts which deal with the public peace deal with chief constables, high constables, special constables, and police, the charges of which are by the different Acts placed upon the county rate, and it is by means of these Acts that justices of the peace, as it appears to me, are released from the charges of keeping the peace in their counties, which I apprehend they would otherwise have to pay as incident to the performance of their duty. But the maintenance of troops, assuming them to be acting as civilians, is not to be found mentioned in these statutes. Soldiers are not per se "chief constables," "high constables," "special constables," or "police," even assuming that they happen to act as civilians.

I will now take it that the troops are what they really are—

C. A. 1899

REG. v. GLAMORGAN COUNTY COUNCIL.

A. L. Smith L.J.

namely, acting as and being soldiers—and, as this is so, it seems to me, if possible, to be an a fortiori case, for the cost of housing and feeding soldiers is clearly not cast upon the county rate in terms by any statute whatever.

It was next argued by the Solicitor-General that, even if so and the obligation of the county ratepayers to defray these expenses cannot be found in any statute, yet this Court should hold that by the common law of England the justices were entitled to be recouped by the county that for which they had pledged the credit of the county to the tradesmen in the performance of their duty. As to this suggested common law obligation, there is no evidence that it has ever been the practice of the county to bear these expenses. The Solicitor-General, with all the research at his command, has only been able to produce one case upon the subject, and that he cited out of *The Times* newspaper of February 21, 1879, and the question there raised was whether an order by the county treasurer for the payment of money to the high constable in respect of the lodging and feeding of troops brought in to quell riots at Blackburn was a valid order. The order was sought to be upheld, not at common law, be it noticed, but by reason of s. 2 of 41 Geo. 3, c. 78, which enacted that it should be lawful for any two justices to order and direct such reasonable and necessary allowances to be made to any high constable for extraordinary expenses incurred by him in the execution of his duties in any case of tumult, riot, or felony. The rule nisi for a mandamus which had been obtained was made absolute by Cockburn C.J. and Mellor J., the Lord Chief Justice saying, "there being a serious question raised they would leave it to be raised on the record and carried if necessary to the House of Lords." This is the sole case the Solicitor-General has been able to bring to our attention—a poor authority indeed upon which to infer a common law obligation. I must point out that the present rule nisi is not moved under the Act above mentioned; and whether if it had been it would have been successful I give no opinion, for it is not before me, and I may add that, if it had been, the facts of the case do not seem to me to fit in with the section. The present rule is to pay out of

the county fund, or to levy a county rate to pay the tradesmen who are the relators, and not to pay a high constable for any extraordinary expenses he may have incurred, and indeed none, as it appears to me upon the affidavits, have been incurred by any high constable.

I will now turn to the work of a man who had peculiar knowledge on the matters now in question—I mean the late Mr. Charles Clode of the War Office. I find in his work, Military Forces of the Crown, vol. ii. s. 47, p. 142, and a note thereon, that which shews how erroneous it would be for the Court to declare the existence of an obligation upon the ratepayers of counties at common law to pay the cost of soldiers imported into their districts to quell riots as suggested by the Solicitor-General. At s. 47 Mr. Clode says, with regard to the employment of military in lieu of the police, there is this apparent defect in the present law—namely, that the military are sent to and remain in the particular town, not at the expense of the local, but of the general community, giving thereby a premium instead of inflicting a pecuniary mulct upon the inhabitants of the town or place for their insufficient ordinary police arrangements, and the example he gives in the note is peculiarly pertinent to the common law point, now for the first time, I believe, suggested by the Solicitor-General. The note is this: "For example, if the Manchester magistrates request 500 men of the Metropolitan Police to be sent down to aid in maintaining the peace and order of the town, the magistrates provide for the men and the ratepayers of Manchester bear their expenses; but, if the same magistrates request 500 soldiers to be sent for the same purpose, the taxpayers of the kingdom have to bear all the expenses of the 500 soldiers and the ratepayers of Manchester nothing." Where is there any place for holding a duty imposed at common law upon the ratepayers to pay for the housing and feeding of soldiers? There is none, for no such obligation at common law in fact exists, and if this obligation is to be imposed it must be by statute. The case of *Rex* v. *Essex* (1) was pressed into the service of the Solicitor-General in order to shew that the

(1) 4 T. R. 591.

C. A. 1899

REG. v. GLAMORGAN COUNTY COUNCIL.

A. L. Smith L.J.

county rate might be liable for expenses not cast upon it by statute. That case was whether the justices of a county might pay the expense of litigating as to a fine which they thought had been illegally imposed upon the county, and it was held (see specially by Buller J.) that on the true construction of the Act 12 Geo. 2, c. 29, the necessary expenses of everything relating to the subjects therein mentioned must be borne by the county and paid out of the county stock; but as this Act in noway relates to the payment of the maintenance of soldiers in a county, the case, in my judgment, has no application to the case in hand. For the above reasons I think that the tradesmen make out no duty in the county ratepayers to pay the expenses in question, and I agree with the Divisional Court that the rule nisi should be discharged. This appeal must, therefore, be dismissed.

VAUGHAN WILLIAMS L.J. read the following judgment:— In my opinion the judgment of the Divisional Court must be affirmed.

The key to the whole question is to be found in the judgment of the Court of Queen's Bench in *Rex* v. *Essex*. (1) Lord Kenyon C.J. says: "If the contest in this case had been, Whether the justices of the county could arbitrarily impose taxes on the county? the only answer that could have been given would have been in the negative. But the question here is, Where, by any express law, or by precedent and long usage, that which has been done was not lawfully done? and if it be warranted by precedent and long usage, and by many analogous cases in the law, the order may be supported, though there may be no precise Act of Parliament to direct it." Now in the present case it is not suggested that there is any statute authorizing the levy of a rate for the payment of the expenses incurred in the maintenance of the soldiers called in to maintain order, or that there is any statute that authorizes the payment of such expenses out of the county fund, neither is it suggested that these expenses are the necessary expenses of things relating to subjects mentioned in such Acts, within the

(1) 4 T. R. 591.

principle laid down by Buller J. in the same case, who says: "In my opinion, the true construction of this Act is, that the necessary expenses of everything relating to the subjects therein mentioned, must be borne by the county, and paid out of the county stock."

The mandamus asked for in the present case is a mandamus to the county council of the administrative county of Glamorgan ordering them to pay certain sums to certain tradesmen who had provided food and other things for the maintenance of the soldiers. This distinguishes the present case from the case which was before Cockburn C.J. and Mellor J. on Feb. 21, 1879, in which case the application was for a mandamus directing the treasurer of the county fund to obey an order of two justices, confirmed at quarter sessions, to pay to the chief constable the extraordinary expenditure incurred for the maintenance of a military force called in by the justices on the occasion of riots at Blackburn. It was contended that such an order could be justified by 41 Geo. 3, c. 78, s. 2, which provides that it shall be lawful for two justices to order such reasonable and necessary allowances to be made to any high-constable for any county for any extraordinary expenses incurred by him in the execution of his duty in any case of tumult, riot, or felony. The section goes on to provide for the confirmation of the order at quarter sessions. The writ of mandamus was granted, the Court saying that the question could then be raised on the record and carried to the House of Lords if necessary, but suggesting that it might answer the purpose to appeal against the decision before incurring the expense of issuing the writ. The rule was made absolute for the issue of the writ, but there does not seem to have been any appeal. In that case there was an affidavit by the chief constable, saying that in his opinion the expenses were necessarily incurred in providing lodgings, rations, and otherwise maintaining the military force, and that in his opinion such military force was necessary to aid and assist the civil authority in maintaining peace and good order, and that without such military force it would not have been possible for him to have maintained peace and good order in the division. As the Lord

C. A. 1899

REG. v. GLAMORGAN COUNTY COUNCIL.

Vaughan Williams L.J.

Chief Justice points out, the affidavit does not state that the force was obtained by the chief constable, although when the soldiers were there he availed himself of their assistance. Indeed, it does not appear that the lodging and rations were ordered by him.

I have dealt with this case at some length because the facts are uncommonly like the facts in the present case, and I wish to guard myself against being supposed to decide that if the application had been for a mandamus to order payment to the chief constable of expenses incurred by him, instead of being, as it is, an application for an order to make payments to certain tradesmen who provided food, &c., for the soldiers, a mandamus might not have issued. I note, however, that there is no affidavit in the present case by Captain Lindsay, the chief constable, and that the affidavits as to his approval are very vague.

A. L. SMITH L.J. Rigby L.J. agrees with the judgment of this Court.

Appeal dismissed.

Solicitors for prosecution: *Bell, Brodrick & Gray, for Linton & C. & W. Kenshole, Aberdare.*

Solicitors for defendants: *Cheston & Sons.*

A. M.

In re VAUTIN.
Ex parte SAFFERY.

1899
July 24.

Bankruptcy—Contract induced by Fraud of Bankrupt—Election by Vendor to affirm Contract—Petition by Secured Creditor—Right of Trustee to Redeem Security at Value assessed in Petition—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-s.* 2; *Sched. I., r.* 12, *and Sched. II., rr.* 11–13—*Bankruptcy Rules*, 1886, *r.* 353—*Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 100.

When a secured creditor presents a bankruptcy petition against his debtor and adjudication follows, there is nothing in the Bankruptcy Act, 1883, or the rules thereunder, that entitles the trustee in bankruptcy to redeem the petitioning creditor's security at the value he places on it in his petition.

V. bought shares of H. and induced H. to give him the certificates of the shares and to accept his cheque for 3298*l.* 16*s.* in payment, representing that it would be met. The cheque was dishonoured and V. absconded. Soon afterwards V. was adjudicated bankrupt on a petition presented against him by H., based on the dishonoured cheque, H. alleging in his petition that he had a security or lien on the shares, which security or lien he valued at 3200*l.* Meantime H. had issued a warrant against V., under which he was arrested and committed for trial for fraud, and subsequently convicted. Thereupon the certificates of the shares were, on an order of the Court made under s. 100 of the Larceny Act, 1861, restored to H. The trustee in bankruptcy of V. then claimed to redeem the shares at the value placed on them by H. in his petition:—

Held, first, that as the title to the shares had, on the conviction of V., revested in H. under s. 100 of the Larceny Act, 1861, he ought not to be deprived of them by reason of his mistake in treating them as a security in his petition; and, secondly, that even if H. had affirmed the contract of sale for the shares, there was nothing in the Bankruptcy Act, 1883, or the rules thereunder, that entitled the trustee to redeem the shares at the amount at which they were valued in the petition.

In re Lacey, (1884) 13 Q. B. D. 128, distinguished.

MOTION by the trustee in bankruptcy for a declaration that on June 7, 1899, being the date of the tender by the trustee to the respondent Hart of the sum of 3200*l.*, the trustee became by virtue of the tender entitled to certain valuable securities specified in the amended petition of the respondent, namely, twenty-nine certificates for ten shares each in the Louisville and Nashville Railway Company; (2.) for an order on the

1899

VAUTIN, *In re.*
SAFFERY, *Ex parte.*

respondent to deliver the said twenty-nine certificates to the trustee upon payment by him to the respondent, or as the Court shall direct, of the said sum of 3200*l.*

On October 26, 1898, Vautin, the bankrupt, bought of Hart, a stockbroker, 290 shares of the Louisville and Nashville Railway Company for 3298*l.* 16*s.*, to be taken up and paid for in cash the next morning. On October 27 Vautin personally tendered his cheque for 3298*l.* 16*s.* to Hart, which was at first refused, but on Vautin assuring Hart that the cheque would be met it was accepted, and the certificates of the shares were handed to him. The next day the cheque was returned dishonoured; Vautin absconded.

On October 31 Hart presented a bankruptcy petition against Vautin for the amount of the dishonoured cheque, alleging that he had no security for the debt; the act of bankruptcy relied on being Vautin's departure out of England with intent to defeat and delay his creditors. On November 1 a receiving order was made against Vautin, and on November 4 he was adjudicated a bankrupt, and Mr. Saffery was appointed the trustee.

On November 4 Vautin sent the certificates of the shares by post to Mr. Hepworth, the solicitor of Mrs. Vautin. Hart was informed of the fact, and the certificates of the shares were deposited at a bank to await the result of pending proceedings.

On November 10 Hart applied to the Bankruptcy Court for leave to substitute in his place certain other creditors as petitioning creditors, and that he might be allowed to withdraw from the proceedings; or, alternatively, that he might amend his petition by giving particulars of security.

On November 16 Hart obtained a warrant for the arrest of Vautin.

On November 22 the Court declined to allow Hart to substitute other persons as petitioning creditors, but gave him leave to amend his petition. The amended petition stated as follows:—

"That the said Claude Vautin is justly and truly indebted to me in the sum of 3298*l.* 16*s.*, being the amount due to me upon his dishonoured cheque dated the 27th October, 1898, for

1899

VAUTIN, *In re.* SAFFERY, *Ex parte.*

that sum, the consideration for such cheque being 290 Louisville and Nashville Railway ordinary shares to bearer obtained from me by the debtor by fraud.

"That I claim to hold security or lien on such shares so obtained from me by the said debtor by trick and fraud, and which security or lien I value at 3200*l.*"

In February, 1899, Vautin was arrested, brought to England, and committed for trial. On April 10 he was tried at the Central Criminal Court for obtaining the shares by false pretences. He pleaded guilty and was sentenced, and the judge, on the application of Hart, made an order under s. 100 of the Larceny Act, 1861, directing the certificates of the shares to be restored to Hart. The restitution of the certificates was not opposed by the trustee. Shortly afterwards the trustee claimed to redeem the shares at the value assessed in Hart's amended petition, and on June 7 he formally tendered Hart the 3200*l.* in cash and demanded delivery of the certificates. The tender was declined and delivery refused, and thereupon he applied to the Court as above stated. At the date of the tender the shares had gone up considerably in value.

Rufus Isaacs, Q.C., and *Muir Mackenzie*, for the trustee. It is said on the other side that the property in the shares was restored to Hart by virtue of the order of the Court under s. 100 of the Larceny Act, 1861, and that he is entitled to keep them absolutely. But that order only restored to him the possession of the shares and placed him in the same position as he was on October 27 before he parted with them to Vautin. The original contract was not fraudulent—the fraud was in obtaining possession of the certificates by misrepresentation. There was a contract in the first instance, and therefore the property in the shares passed. It is a question of intention in each case: *Cundy* v. *Lindsay*. (1)

[WRIGHT J. referred to *Scattergood* v. *Sylvester* (2) as shewing that an order of the Court was not necessary under s. 100 of the Larceny Act, 1861.]

(1) (1878) 3 App. Cas. 459. (2) (1850) 15 Q. B. 506.

1899

VAUTIN, *In re.* SAFFERY, *Ex parte.*

As soon as Hart discovered the fraud it was his duty to elect whether he would repudiate the transaction or stand by it as a sale: *White* v. *Garden*. (1) He elected to affirm it, and then confirmed it again by amending his petition as a secured creditor and claiming a lien on the shares as security for his purchase-money. By s. 168 of the Act a secured creditor is a person who holds a charge or lien "on the property of the debtor." Therefore, when Hart says in his petition that he holds security for his purchase-money, he affirms that the shares are "the property of the debtor." Lastly, a secured creditor who petitions is bound, under sub-s. 2 of s. 6 of the Act, to value his security, and is on the same footing as a creditor who proves under rules 9–17 in Sched. II. to the Act. He is bound by his estimate: *Couldery* v. *Bartrum* (2); and the trustee may redeem the security at any time at the value placed on it by the creditor: *In re Lacey* (3); Yate Lee on Bankruptcy, 3rd ed. p. 79; Williams on Bankruptcy, 7th ed. p. 40; Robson on Bankruptcy, 7th ed. p. 209.

Reed, Q.C., and *H. Kisch*, for Hart. Whether Hart affirmed the contract or not, the statute gives the trustee no higher or better right than Vautin had. Counsel for the trustee attended the trial, and when the order of restoration was made said he made no claim to the shares. As assignee of Vautin, the trustee had no title to the shares. *In re Lacey* (3) is no authority for the contention now put forward by the trustee. Hart has not proved nor taken any steps in the bankruptcy since amending his petition, and the rules in Sched. I. and Sched. II. apply only to proofs by secured creditors. It is the settled practice that a petitioning creditor who values a security in his petition has always to prove afterwards under the rules before he can receive a dividend. Under the Bankruptcy Act of 1869, and rule 117 of the Bankruptcy Rules, 1870, a trustee had two months within which he was entitled to redeem the security of a petitioning creditor. There is no such provision in the present Act or Rules, unless it is implied by rule 353, which says, "where no other provision is made by the Act or these

(1) (1851) 10 C. B. 919. (2) (1881) 19 Ch. D. 394.
(3) 13 Q. B. D. 128.

Rules the present law, procedure, and practice in bankruptcy matters shall, in so far as applicable, remain in force." That must mean the immediate antecedent law and practice under the Act of 1869. But here no tender was made by the trustee within two months, and therefore he is out of court. But even if the rules under Sched. II. apply, a secured creditor is entitled to amend his valuation: *In re Newton.* (1) Hart, therefore, is entitled to amend his valuation, and to be treated as a fully secured creditor. The difference between a petitioning creditor and a proving creditor in respect of a secured debt is pointed out in *Moor* v. *Anglo-Italian Bank.* (2)

Muir Mackenzie, in reply. The foundation of the judgment in *In re Lacey* (3) is that the petitioning creditor is bound by the value he puts on his security. The procedure under the Act of 1869 and the Rules of 1870 applies. It is incredible that the Legislature intended by the Act of 1883 that a petitioning creditor should put what value he liked on his security in his petition, and not be bound by the correlative right of the trustee to redeem.

WRIGHT J. In this case it seems to me that the language of the Act and of the Rules is sufficiently clear. I think that the title to the shares was revested in Hart on the conviction of Vautin by the operation of s. 100 of the Larceny Act, 1861, without any order of the Court being required for that purpose: see *Scattergood* v. *Sylvester.* (4) So clearly is that the law that the learned counsel who appeared for the trustee at the trial of Vautin at the Central Criminal Court did not claim any right to the shares. That being so, Hart was mistaken in treating the shares as a security in his amended petition. They were really his own property. This mistake ought not to deprive him of his right to the shares, or give the trustee on that ground alone any claim to redeem them. But, secondly, even if Hart did affirm the contract, I think the claim of the trustee fails on the ground that there is nothing in the Bankruptcy Act, 1883, or the Rules, which gives him the right to

(1) [1896] 2 Q. B. 403.
(2) (1879) 10 Ch. D. 681.
(3) 13 Q. B. D. 128.
(4) 15 Q. B. 506.

1899

VAUTIN, *In re.* SAFFERY, *Ex parte.*

Wright J.

redeem a security except in cases where a creditor has proved either under Sched. I. for the purpose of voting, or under Sched. II. for the purpose of ranking for a dividend. The 11th rule in Sched. II. provides that a secured creditor shall, before ranking for dividend, state *in his proof* the value at which he assesses his security. Then rule 12 says that where a security is "so valued" the trustee may at any time redeem it on payment to the creditor of the assessed value, and the same words "so valued" occur again in rule 13. I think that those words "so valued" in those rules expressly refer to the 11th rule, and mean, as that rule says, the assessed value in the proof. Here Hart has not proved for his debt, and therefore these rules do not apply; and, whatever may have been the intention of the Legislature, there is nothing in the Act or the Rules which goes further or applies to a petitioning creditor. But then I have to deal with the case of *In re Lacey*. (1) At first I thought that it expressly applied to the present case; but when it is looked at, it is only a case turning on the sufficiency of the petitioning creditor's debt. I do not think it is an authority on the question of redemption, because the attention of the Court there was not called to the point raised in the present case. I think, therefore, that it is not an authority for the proposition cited in the text-books—that where a debtor is adjudicated bankrupt on the petition of a secured creditor, the trustee in bankruptcy is entitled to redeem the security at the amount of the petitioner's estimate.

Solicitors for trustee: *Halse, Trustram & Co.*
Solicitors for creditor: *Beyfus & Beyfus.*

(1) 13 Q. B. D. 128.

H. L. F.

KING *v.* HUTTON.

1899
Aug. 1.

Bankruptcy—Stock Exchange—Broker and Customer—Customer's Speculative Account—Bankruptcy of Broker—Differences due to Customer—Rules of the Stock Exchange — Surplus in Hands of the Official Assignee of the Stock Exchange—Title of Trustee in Bankruptcy.

A broker on the Stock Exchange was officially declared a defaulter. The same day the official assignee, under the Rules of the Stock Exchange, closed all accounts of the broker then open, and received and paid all amounts owing by or to him on the Stock Exchange, and, after payment of all the Stock Exchange liabilities of the broker, there remained a surplus in the hands of the official assignee. Shortly afterwards the broker was adjudicated bankrupt with large outside liabilities. Part of the surplus above mentioned comprised a sum of money which represented differences, being profits, due on contracts made with jobbers on the Stock Exchange by the broker as agent for an outside customer, who was running a speculative account on the Stock Exchange through him, and which the broker, had he been solvent, would have received for such customer on the day he became a defaulter. Both the customer and the trustee in bankruptcy of the broker having claimed this sum of money, the official assignee paid it into court under an interpleader summons:—

Held, that the sum of money in question was merely a book-debt of the broker and formed part of his general assets, and therefore passed to his trustee in bankruptcy; and that the remedy of the customer was to prove in the bankruptcy for the amount.

THIS was an interpleader issue that raised the question as to who was entitled to a sum of 286*l.* 8*s.* 9*d.* that had been paid into court by the official assignee of the Stock Exchange under these circumstances.

The defendant Hutton was an outside customer of one Basil Woodd, a broker on the Stock Exchange, and was running a speculative account through him. On the accounts settled between Hutton and Woodd on December 3, 1898, there was a profit balance, being differences, which Woodd retained, as well as a sum of 350*l.* sent him by Hutton, as cover for further dealings.

On December 13, 1898, Woodd, on behalf of Hutton, bought certain stocks of jobbers on the Stock Exchange, and on December 19 he sold on behalf of Hutton some of the stocks to other jobbers on the Stock Exchange for the account at the

1899

KING v. HUTTON.

end of December. On December 28, which was settling day, the differences on this transaction shewed a profit for Woodd to receive on behalf of Hutton. On December 29, which was ticket day, Woodd passed the ticket of the stocks he had sold to the jobbers, thus closing the contracts. The same day he absconded, owing large outside liabilities; and on December 30, which was pay day, he was "hammered" on the Stock Exchange, i.e., officially declared a defaulter.

On January 3, 1899, a receiving order was made against Woodd on a creditor's petition, adjudication followed, and the plaintiff King was the trustee in bankruptcy.

On December 30, 1898, the official assignee of the Stock Exchange, in accordance with the Rules of the Stock Exchange (1), closed all Woodd's contracts then open on the Stock Exchange, and, after receiving and paying all amounts owing by or to members of the Stock Exchange, there remained a surplus of some 600*l.* in his hands which was due to outside clients of Woodd. 286*l.* 8*s.* 9*d.* of this surplus was the profit or differences which Woodd, had he been solvent, would have received on behalf of Hutton on the transaction above stated. Both Hutton and the trustee in bankruptcy claimed payment of this 286*l.* 8*s.* 9*d.* from the official assignee, and in February Hutton commenced an action against the official assignee to enforce his claim. Thereupon the official assignee, under the usual interpleader summons, paid the money into court, and the issue was directed which now came on for trial.

H. Reed, Q.C., and *Muir Mackenzie*, for the trustee in bankruptcy. The Queen's writ runs on the Stock Exchange, and

(1) The Rules of the Stock Exchange provide :—

"Rule 156. Creditors for differences shall have a prior claim on all differences received by, or due to, a defaulter's estate.

"Rule 161. The committee will not recognise any claim on a defaulter's account that does not arise from a Stock Exchange transaction.

"Rule 168. Non-members shall be allowed to participate in defaulters' estates, provided their claims be admitted by the creditors, or, in case of dispute, by the committee; and a person whose claim is so admitted, may be represented at the meeting of creditors by any member whom he may select.

"Rule 176. The assignees shall collect and pay the assets to the credit of their joint account at a banker's, and shall distribute the same as soon as possible."

the rules of that body cannot oust the rights of the general creditors in bankruptcy of a defaulting member to get from the official assignee the assets that he has collected: *Tomkins* v. *Saffery*. (1) This is not a case like *In re Plumbly* (2), where the official assignee was claiming adversely to the trustee in bankruptcy. Here there is a surplus in the hands of the official assignee, and the sum that has been paid into court is part of the general assets of Woodd. It is as much a book-debt of his as a book-debt of any ordinary tradesman, and passes to his trustee in bankruptcy, unless Hutton can shew that it is impressed with some trust, or there has been some specific appropriation in his favour, or that he has some mortgage, charge, or lien upon it. His only remedy is to prove in the bankruptcy.

Rufus Isaacs, *Q.C.*, and *Widnell*, for the defendant Hutton. In the case of *In re Plumbly* (2) the defaulter was a jobber, and there could be no outside creditors in the sense of there being differences to pay, and the point in the present case never arose. Here the defaulter is a broker, and the relation of principal and agent existed between Hutton and himself. If Woodd had been solvent, he would have received this money on behalf of Hutton and would have held it in a fiduciary capacity, and could have had no possible answer to an action by Hutton, for it is money had and received to his use: *In re Strachan* (3); *Taylor* v. *Plumer* (4); *In re Wood* (5); *Harris* v. *Truman*. (6) Woodd's trustee in bankruptcy can have no higher right. He can only take the bankrupt's property subject to the same rights and equities as the bankrupt. This money was never part of Woodd's assets. It was a debt due to him as agent for Hutton, which Hutton could have collected. The fact that the official assignee has collected it for him makes no difference. It is his money which he can follow.

[They also referred to *Robinson* v. *Mollett* (7) and *May* v. *Angeli*. (8)]

(1) (1877) 3 App. Cas. 213.
(2) (1880) 13 Ch. D. 667.
(3) (1876) 4 Ch. D. 123.
(4) (1815) 3 M. & S. 562.
(5) (1873) 28 L. T. 174.
(6) (1882) 9 Q. B. D. 264.
(7) (1875) L. R. 7 H. L. 802.
(8) (1897) 13 Times L. R. 568.

1899

KING
v.
HUTTON.

PHILLIMORE J. This case has presented several difficulties; but, upon the best consideration I can come to, I think there must be judgment for the plaintiff on the issue. The form of the issue in this case and the fact that the money is in court renders it unimportant to consider any question of parties or any question of procedure. The real and sole question here is whether a sum of 286*l.* 8*s.* 9*d.*, less, I suppose, some costs of paying it in, is part of the general assets of the defaulting debtor Woodd, or whether it is impressed with a special trust in favour of the claimant, the defendant Hutton. Now, this fund was not really collected by the action of the official assignee under the operation of the Stock Exchange rules, by which, when a man becomes a defaulter, his actual transactions are put an end to. This particular sum of money simply represents the balance due from Woodd to Hutton on the settling day, December 28, Woodd not having become a defaulter until the 30th. We have nothing to do here with any moneys which might have accrued under current transactions between December 28 and the settling day in the middle of January. This sum of 286*l.* 8*s.* 9*d.* represents simply differences due at the last settling day which could have been recovered then, if they had so chosen, by the clients, or, at any rate, on December 30, which was pay day. It is not an artificial fund created by the Rules of the Stock Exchange; and, therefore, I have not to consider the questions which were decided in the case of *In re Plumbly*. (1) Nor, again, is this a case in which a broker has been directed to sell a particular parcel of stock and reinvest the proceeds in some other named stock, in which case some of the language in *In re Strachan* (2), and possibly in *Taylor* v. *Plumer* (3), might apply. Here Hutton has made Woodd his agent to buy and sell various stocks on the Stock Exchange, and the arrangement between them, as I find it, was this—not that in respect of each security the value of it when sold came to Hutton, nor even that in respect of each security the difference of profit or loss between buying and selling came to or was paid by Hutton,

(1) 13 Ch. D. 667.

(2) 4 Ch. D. 123.

(3) 3 M. & S. 562.

but that the only thing Hutton expected to get from Woodd was the balance of account, the balance, if there was one, of profit over loss on the various securities dealt with as each account came through. Now, in respect of that balance, can it be said that Woodd was a trustee for Hutton? I think it cannot. Can it be said that Hutton had a lien on that specific balance? I think certainly not. I think it was a general debt due from Woodd to Hutton, and, therefore, a debt for which Hutton under the circumstances must prove for in the bankruptcy in the ordinary way. I have not here to deal, as I have said, with cases where the default occurs in the middle of a bargain. In that case, I have no doubt, the customer can step in either by himself or by another broker and complete the transaction, and receive the stock or the purchase-money of the stock, as the case may be. But in this case these differences were all ascertained and fixed. There was no stock to receive, no stock to sell, on the account between the broker and customer: there was merely a balance. I have considered all the cases to which I have been referred, and I come to the conclusion that it is not right to say that this balance is the specific money of the customer. It is a debt due from the broker to the client, and the fund in question is part of the ordinary assets of the broker and must be paid over to the trustee in bankruptcy, and Hutton must prove against the bankrupt's estate in the usual way. There will be judgment for the plaintiff with costs.

Solicitors for plaintiff: *Ellis, Bickersteth & Ellis.*
Solicitors for defendant: *Cheston & Son.*

H. L. F.

1899
Aug. 2.

SHOOLBRED *v.* ROBERTS.

Bankruptcy — Undischarged Bankrupt — After-acquired Property—Personal Earnings—Game of Skill—Wagering Contract—Stakes claimed by Trustee in Bankruptcy—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 18—*Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 53.

An undischarged bankrupt played a match at billiards for 100*l.* a side, the money being deposited with stakeholders. The bankrupt won, and both he and his trustee in bankruptcy claimed the 200*l.* in the hands of the stakeholders, who thereupon paid the money into court:—

Held, that, assuming the stakes were recoverable by the bankrupt from the stakeholders by action at law, they were property of the bankrupt which passed to his trustee under s. 44 of the Bankruptcy Act, 1883.

But *held*, that the stakes being money payable under a wagering contract, which was null and void under the Gaming Act, 1845, were irrecoverable by the bankrupt, and that his trustee had no better title:

Held, further, that, notwithstanding s. 1 of the Gaming Act, 1892, the bankrupt could recover back his deposit of 100*l.*, which was his own money, and therefore that this deposit belonged to his trustee.

Diggle v. *Higgs*, (1877) 2 Ex. D. 422, followed.

THIS was an interpleader issue to determine who was entitled to a sum of money that had been paid into court under these circumstances.

In March, 1898, a receiving order was made against John Roberts, the champion billiard player, adjudication followed, and the plaintiff was the trustee in bankruptcy. The bankrupt was still undischarged.

In November, 1898, the bankrupt and Charles Dawson, also a billiard player, entered into an agreement to play a match at billiards for 100*l.* a side, the money to be deposited with the editor of the *Sportsman* newspaper, and to be paid over to the winner. The stakes were duly paid to and received by the proprietors of the *Sportsman* as stakeholders. The match commenced in March and terminated on April 3, 1899, in favour of the bankrupt. On March 29, 1899, the plaintiff gave notice to the stakeholders that he should claim the 200*l.* as the trustee in bankruptcy, and on April 5 the bankrupt also gave notice to the stakeholders claiming the money. There-

upon the latter paid the 200*l.* into court under the usual interpleader summons, and an issue was directed to determine whether the plaintiff or the defendant was entitled to the money.

There was evidence that the bankrupt was earning by his skill as a billiard player upwards of 1500*l.* per annum.

Reed, Q.C., and *E. T. Holloway*, for the trustee. This money is not the proceeds of the bankrupt's personal labour and passes to the trustee under s. 44 of the Bankruptcy Act: *Wadling* v. *Oliphant* (1); but even if it is the result of his personal skill, it is not required for the maintenance of the bankrupt's family, as the evidence shews that he is earning a large income, and therefore the trustee is entitled to it: *In re Graydon* (2); *Mercer* v. *Vans Colina*. (3)

Bonsey, for the bankrupt. The cases cited do not apply. This is not after-acquired property under s. 44 nor income under s. 53. This is money acquired by the personal skill of the bankrupt, which the trustee cannot claim: *In re Hutton* (4); *In re Rogers*. (5) The case of *Hunt* v. *Fripp* (6) shews that not everything coming to a bankrupt, whilst undischarged, passes to his trustee in bankruptcy. But, further, this is a sum payable under a wagering contract which is void under the Gaming Act, 1845, and under s. 18 of that Act cannot be recovered by the bankrupt, and his trustee is in no better position. *Diggle* v. *Higgs* (7) and *Trimble* v. *Hill* (8) have decided that, although an action will not lie to recover the stakes, yet a depositor may maintain an action to recover back his deposit. If that principle applies here, Roberts is entitled to recover back his deposit of 100*l.*, but the trustee cannot claim it because, on the evidence, it was not Roberts' own money, but money lent him by his wife for that purpose. It is submitted, however, that having regard to s. 1 of the Gaming Act, 1892 (9),

(1) (1875) 1 Q. B. D. 145.
(2) [1896] 1 Q. B. 417.
(3) (1897) 67 L. J. (Q.B.) 424.
(4) (1884) 14 Q. B. D. 301.
(5) [1894] 1 Q. B. 425.
(6) [1898] 1 Ch. 675.
(7) 2 Ex. D. 422.
(8) (1879) 5 App. Cas. 342.
(9) The Gaming Act, 1892, s. 1, enacts: "Any promise, express or implied, to pay any person any sum of money paid by him under or in

1899

SHOOLBRED v. ROBERTS.

Diggle v. *Higgs* (1) is no longer law. Here there was an implied promise to repay this deposit, if demanded, and it cannot be enforced. In *Carney* v. *Plimmer* (2) it was held that money lent to pay the deposit on a wager could not be recovered.

E. T. Holloway, in reply. This was not a wagering contract. In substance, the two sums of 100*l.* were contributions or subscriptions to a prize for a legal game of skill, as in *Parsons* v. *Alexander*. (3) But if it were a wager, it is too late now for the bankrupt to raise the objection. This is not an action to recover the stakes or the deposit from the stakeholder. The contract has been carried out and the money paid into court, and it is Roberts' money. The only question now is whether the bankrupt or his trustee has the better title to it. On the evidence the 100*l.* deposited by Roberts was really his own money.

PHILLIMORE J. In this case an interpleader issue has been directed to try whether the trustee in bankruptcy is entitled as against Roberts, the bankrupt, to a sum of 200*l.* which was in the hands of certain gentlemen as stakeholders, and which they have paid into court under the interpleader summons. There is no doubt at all how the sum was created. [His Lordship then stated the facts, and continued :—]

Now, various points have been raised on behalf of Roberts. It is said that this money, assuming it to be money that Roberts could recover by process of law from the stakeholders, is yet not property of Roberts which passes to his trustee in bankruptcy under s. 44 of the Bankruptcy Act, 1883, but comes within the exception which the Courts have engrafted on the word "property" in that section, being personal earnings of the bankrupt. Now, there is no doubt that some earnings of a bankrupt by the exercise of his labour or skill of mind or body

respect of any contract or agreement rendered null and void by the Act 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

(1) 2 Ex. D. 422.

(2) [1897] 1 Q. B. 634.

(3) (1855) 5 E. & B. 263.

are considered as protected from the operation of s. 44, and do not pass to the trustee in bankruptcy. Take the simple case of a day labourer. The wages paid him at the conclusion of the week, the shillings or the sovereigns, are not property which the trustee in bankruptcy can seize. The labourer is entitled to use them to support himself and his family. One rises from the day labourer to the higher and more skilled occupations—the professions and various occupations which are very highly paid—and up to a point the thing remains the same. When you come to a very highly paid profession, such as an actor, or painter, or an eminent surgeon, the Courts have hesitated as to whether the whole of the emoluments of the gentleman are or are not protected as personal earnings from the operation of the section. I think it is unnecessary for me to go further into the point beyond saying that I adopt the view which I consider to have been taken by Wright J. in *Mercer* v. *Vans Colina* (1), that there must be at least an element of periodicity in the earnings. Lump sums arising at very indefinite periods —windfalls, so to speak—or special prizes are not, at any rate in my opinion, protected under s. 44. If Roberts were employed by some proprietor of some great house of entertainment to play daily or weekly for a fixed stipend, then the question would arise which Vaughan Williams L.J. considered but did not finally determine in the case of *In re Graydon*. (2) Then the question would be whether the whole of the money or only a portion of it was protected. This is not such a case. Here on an isolated occasion in a particular contest of skill Roberts has acquired a sum of 200*l*. I cannot consider that that sum is personal earnings of a bankrupt protected by the construction which the Courts have put upon s. 44, and similar sections in previous Bankruptcy Acts. Therefore that contention on behalf of Roberts fails.

Then Mr. Bonsey raised an unexpected defence, but one which turns out on investigation to be very formidable. He says that this money was acquired by way of gaming or wagering within the meaning of the Gaming Act, 1845. I confess that for the moment I had forgotten the decisions in

(1) 67 L. J. (Q.B.) 424. (2) [1896] 1 Q. B. 417.

1899

SHOOLBRED v. ROBERTS.

Phillimore J.

Diggle v. *Higgs* (1) and *Trimble* v. *Hill* (2), and, having forgotten them, I was surprised that when there was a perfectly lawful contest in a game of skill between two persons, the prize for success in that contest should be recoverable if it was subscribed for by outside persons, but not recoverable if it was subscribed for by the competitors themselves; but I am bound now to hold since the decisions in those two cases that where people embark in a perfectly lawful game and contest of skill, not trusting to fortune but to skill, to ascertain the comparative eminence of the two persons, the sums which they deposit to make a joint award are to be considered by the law as sums deposited by way of wagering, the contract is null and void, and the winner cannot recover the fund. I confess that I regret that such should be the law, but it is so. This being the law, I am bound here to hold that this lump sum of 200*l.* could not have been recovered by Roberts from the stakeholders. It is, therefore, not after-acquired property of Roberts within the meaning of s. 44, and therefore did not pass to his trustee in bankruptcy. I have been pressed by Mr. Holloway on behalf of the trustee, and no doubt it is true in one sense, that I have only got to determine, as between the trustee and Roberts, which has the better title; and as between them, if the money had ever become Roberts', I should have no doubt that the trustee was entitled to it. But I have to remember that there may be voluntary gifts to a bankrupt by friends or relatives which once given to the bankrupt remain his property and cannot be seized by the trustee. One must consider that this money, if it ever comes to Roberts, at any rate as regards the half of it which was contributed by Dawson, must be in the eye of the law a voluntary gift by the stakeholders, or by Dawson, or possibly by both, to Roberts; and, if Roberts should receive it of the bounty of Dawson, or of the bounty of the stakeholders, or of the bounty of both, so far it would not go to the trustee in bankruptcy. However, when one gets as far as that, one has to look a little more closely into the matter. The view that it would be a gift is a true view as regards the 100*l.*

(1) 2 Ex. D. 422. (2) 5 App. Cas. 342.

contributed by Dawson; but as to the other 100*l.*, it is Roberts' own money, and if it is his money it is a part of his property which his trustee in bankruptcy has a right to have. It was suggested, and there was some colour for it on the evidence, that this 100*l.* was not Roberts' money at all, but was lent to him by his wife for the purpose of enabling him to deposit it with the stakeholders. But, after hearing the evidence of Roberts and his wife, I am clear that I must hold this money to have been Roberts' own money.

Then Mr. Bonsey raised a third point, and one well worthy of consideration, that the amending Gaming Act of 1892 has made it impossible for a gamester to recover back his deposit, and that the decision of the Court of Appeal in *Diggle* v. *Higgs* (1), which allowed a gamester to recover back his deposit, is no longer law. Mr. Bonsey puts it that there is here an implied promise to repay a sum of money paid in respect of a contract rendered null by the earlier Gaming Act. There is a great deal to be said in favour of this contention; but I think, having regard to the decision in *Diggle* v. *Higgs* (1) and the knowledge that the Legislature must be taken to have possessed of that decision when it passed the later Act, that I cannot hold that this money was paid in respect of such a contract or agreement; and that the "promise expressed or implied" to repay cannot be construed to cover an implied duty in law to repay money which was paid upon a consideration which did not in law exist. I therefore come to the conclusion that there is nothing in the later Act to take away the common law right of the gamester to recover back his deposit as money paid upon a consideration which in law did not exist. Therefore I think, looking at this matter as strict law, that 100*l.* of this money was Roberts' own money, and therefore goes to his trustee in bankruptcy. The other 100*l.* was not Roberts' money; therefore at present there will be no order as to it, but there will be liberty to apply in chambers.

Solicitors for plaintiff: *Roscoe & Hincks.*

Solicitors for defendant: *Letts Brothers.*

(1) 2 Ex. D. 422.

C. A.
1899
July 28;
Aug. 4.

[IN THE COURT OF APPEAL.]

In re NEIL MACKENZIE.
Ex parte THE SHERIFF OF HERTFORDSHIRE.

Bankruptcy—Debtor—Execution Creditor—Sheriff, Sale by—Proceeds of Sale—Landlord—Rent in Arrear—Lien—Priority—Payment by Sheriff—Indemnity—Title to Proceeds of Execution—Official Receiver—Trustee—"Goods of a Debtor"—Stat. 8 *Anne, c.* 14 (*c.* 18 *in Rev. Stat.*), *s.* 1—*Bankruptcy Act*, 1890 (53 *&* 54 *Vict. c.* 71), *s.* 11—*Appeal—Trustee in Bankruptcy—Costs.*

Where under an execution the sheriff sells the goods of the judgment debtor, and subsequently, under s. 11 of the Bankruptcy Act, 1890, receives from the official receiver notice of bankruptcy proceedings commenced against the debtor since the sale, together with a demand for payment of the proceeds of sale, he is entitled to retain out of the proceeds and pay the landlord of the premises on which the execution was levied any arrears of rent due to him from the debtor, not exceeding the amount of one year's rent, even though he, the sheriff, has not received notice of the landlord's claim until after the sale, and notwithstanding that the sale has deprived the landlord of the lien given him on the goods themselves by s. 1 of 8 Anne, c. 14 (c. 18 in Revised Statutes).

The right of the landlord to be paid out of the proceeds of sale in the hands of the sheriff, where no bankruptcy intervenes—a right established by the practice uniformly adopted under the statute of Anne and recognised by judicial authority long before the present law of bankruptcy—is not affected by s. 11 of the Bankruptcy Act, 1890. The expression "the goods of a debtor" in that section does not include the goods of a judgment debtor, which are by the statute of Anne impounded until the landlord is paid; nor are the proceeds of sale of those goods to be handed by the sheriff to the trustee in bankruptcy under that section free from the right of the landlord, sanctioned by long practice, or of the sheriff for his own indemnity.

In re M'Carthy, (1881) 7 L. R. (Ir.) 473, approved and followed.

Decision of Divisional Court (Wright and Bigham JJ.) reversed.

A trustee in bankruptcy who is respondent to a successful appeal is not entitled, as a matter of course, to have the costs paid out of the bankrupt's estate: unless he can make out a right to the contrary, he will be ordered to pay them personally.

Ex parte Stapleton, (1879) 10 Ch. D. 586, not followed.

APPEAL from an order of the Divisional Court (Wright and Bigham JJ.).

On August 19, 1898, execution was issued against the goods

of the debtor, a nurseryman in Hertfordshire, by a judgment creditor. The sheriff did not at once sell, but remained in possession until September 14, 1898, on which day the goods were sold. On September 15 the debtor committed an act of bankruptcy by non-compliance with a bankruptcy notice which expired on that day; on the following day, the 16th, a bankruptcy petition was presented against him, and on the same day notice of the presentation of the petition was given to the sheriff. On October 6 the debtor's landlord gave notice to the sheriff that he claimed a sum of 32*l.* 10*s.* for one quarter's rent from Lady Day to Michaelmas, 1898, in respect of the premises on which the execution had taken place. On October 10 a receiving order was made on the petition, and a trustee was duly appointed. On October 12 the official receiver, pursuant to s. 11 of the Bankruptcy Act, 1890, served the sheriff with a formal notice of the petition and receiving order, and a demand for delivery-up of the goods seized or payment of the proceeds of sale. On October 15 the debtor was adjudicated bankrupt. On October 22 the sheriff, out of the proceeds of the execution, and notwithstanding the notice from the official receiver, paid the landlord his quarter's rent, 32*l.* 10*s.*, and the rest of the proceeds he paid over to the trustee in the bankruptcy, the official receiver having insisted on the entire proceeds being paid over, less only the sheriff's costs, his contention being that the sheriff, on levying execution, should have obtained from the execution creditor sufficient money to pay the rent, and that not having done so he was not now entitled to pay the rent out of the proceeds in his hands. The trustee, in accepting the balance of the proceeds, disputed the sheriff's right to deduct the 32*l.* 10*s.* paid to the landlord, his formal receipt for the balance stating that it was without prejudice to his right to recover the 32*l.* 10*s.* from the sheriff. On October 30, 1898, the trustee served the sheriff with a notice of motion in the county court of Middlesex, holden at Edmonton, for an order on the sheriff to pay over to him the 32*l.* 10*s.* On February 14, 1899, the county court judge made an order declaring that the sheriff was liable to pay to the trustee the 32*l.* 10*s.*, and directing him to pay the same personally. On appeal by the sheriff

C. A. 1899

MACKENZIE, *In re.* HERTFORDSHIRE (SHERIFF OF), *Ex parte.*

to the Divisional Court (Wright and Bigham JJ.) on June 15, 1899, the decision of the county court judge was affirmed, and the appeal was dismissed with costs.

The sheriff now appealed to the Court of Appeal. This appeal was heard on July 28, 1899.

Danckwerts and *R. D. Muir*, for the sheriff. The question is whether the sheriff can justify the payment, out of the proceeds of sale of the goods seized, of rent in arrear to the landlord of the premises upon which he has levied, notwithstanding that he has had notice of the presentation of a petition in bankruptcy against the judgment debtor upon which a receiving order is afterwards made. This question depends upon the joint effect of s. 1 of the statute 8 Anne, c. 14 (c. 18 in Revised Statutes), and s. 11 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71). (1) Under the statute of Anne the sheriff

(1) Sect. 1 of the statute 8 Anne, c. 14 (c. 18 in Revised Statutes: Chitty's Statutes, 5th ed. vol. vi. tit. "Landlord and Tenant"), enacts that "No goods or chattels whatsoever, lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of taking such goods or chattels by virtue of such execution: Provided the said arrears of rent do not amount to more than one year's rent."

Sect. 11 of the Bankruptcy Act, 1890, is as follows:—

"(1.) Where any goods of a debtor are taken in execution and before the sale thereof, or the completion of the execution by the section or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge.

"(2.) Where under an execution in respect of a judgment for a sum exceeding 20*l.*, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon or on any other

could not sell unless the execution creditor paid the landlord; but the execution creditor might stand on his rights and not pay the landlord, in which case the sheriff would return nulla bona, which would produce a deadlock. Accordingly, the following practice has grown up under the statute: the landlord does not give nor does the sheriff require notice, before the latter sells, of the rent being in arrear; the sheriff sells, and if the landlord gives notice of the rent being in arrear before the sheriff parts with the proceeds of sale, the sheriff is bound to pay him, and if he does not he becomes a wrongdoer. In short, the execution creditor and the sheriff cannot get the profits of the execution without first paying off the landlord. This practice is laid down by several cases: *Arnitt* v. *Garnett* (1); *Andrews* v. *Dixon* (2); *Wintle* v. *Freeman* (3); *Yates* v. *Ratledge* (4); *Cocker* v. *Musgrove* (5); *Wharton* v. *Naylor* (6); *Dixon* v. *Wilks.* (7) The practice is not affected or altered by s. 11 of the Bankruptcy Act, 1890: that section does not refer to the statute of Anne at all; it is intended to regulate the rights as between the execution debtor, the execution creditor, and the sheriff, and does not affect the rights of other parties. It deals only with the proceeds of sale that form part of the debtor's estate, and the amount due to and belonging to the landlord is no part of that estate.

The landlord's rights are not intended to be swept away by the Bankruptcy Acts: for instance, under s. 42 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), as amended by s. 28 of the Act of 1890, the landlord can distrain for six months' rent.

Muir Mackenzie and *H. Lynn*, for the trustee. If the payment in the present case can be supported, the landlord practically becomes a secured creditor at once, which is in direct contradiction to the bankruptcy laws. Sect. 42 of the

petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor."

(1) (1820) 3 B. & A. 440.
(2) (1820) 3 B. & A. 645.
(3) (1841) 11 Ad. & E. 539, 548.
(4) (1860) 5 H. & N. 249, 252.
(5) (1846) 9 Q. B. 223, 234.
(6) (1848) 12 Q. B. 673, 677–8.
(7) (1859) 9 Ir. C. L. Rep. 467.

C. A. 1899

MACKENZIE, *In re.* HERTFORDSHIRE (SHERIFF OF), *Ex parte.*

Bankruptcy Act, 1883, only creates an exception to the general law in s. 9, which provides that after the receiving order no creditor shall have any remedy against the property of the debtor without the leave of the Court. Thus, were it not for s. 42, the landlord could not distrain without leave. All that the statute of Anne says is that the goods on the premises shall not be liable to be taken in execution unless the execution creditor, before the removal of the goods, first pays the landlord. All the decisions that have been cited protect the landlord, not the sheriff; whereas this is an application for the protection of the sheriff. There are no decisions shewing that the sheriff is to be protected if he removes the goods before paying the landlord. Under the group of sections in Part III. of the Bankruptcy Act, 1883, headed "Property available for payment of Debts," s. 43 provides for the relation back of the trustee's title to the act of bankruptcy, and so gathers in for the creditors even property that the debtor may have parted with. Sect. 44 includes, amongst property available for creditors, all goods that at the commencement of the bankruptcy were in the possession, order, or disposition of the bankrupt. Sect. 45 restricts the rights of an execution creditor, and s. 46 (for sub-ss. 1 and 2 of which s. 11 of the Act of 1890 is now substituted) deals with the duties of the sheriff as to goods taken in execution. The contention of the sheriff in the present case is contrary to s. 11 of the Act of 1890, the effect of sub-s. 1 of which is that, if the landlord does not exercise his right of distraint before a sale of the goods, the whole of the proceeds go over for the benefit of the creditors; for a landlord who does not distrain is not a secured creditor, and in that case the statute does not give him any right either to the goods or to the proceeds. Sub-s. 2 of s. 11 deals with the case of a sale of the goods by the sheriff before he has notice of any bankruptcy proceedings, and on receiving such notice he is to pay the proceeds, less the costs of the execution, to the trustee. Anybody dealing with the bankrupt's property after an available act of bankruptcy does so at his own risk. The expression "costs of the execution" in the section cannot include the rent of a landlord who has not distrained. The cases do not

decide that the sheriff may disregard the requirements of s. 1 of the statute of Anne—that he shall not remove the goods until the landlord's rent is paid or provided for: if he does he is liable to pay the trustee out of his own pocket. In *Arnitt* v. *Garnett* (1) the notice of the landlord's claim was after the removal of the goods by the sheriff and before sale. Here the notice was after the sale, and therefore the case has no application. That case and the other cases cited shew that the sheriff cannot disregard the plain terms of the statute; but they do not deal with a case in which the property of the bankrupt has been transferred to another person. Here the money that was in the hands of the sheriff when he received notice of the landlord's claim was property which had been transferred to the trustee by the relation back. There is nothing giving the landlord a charge on the proceeds on levy of execution.

[*Danckwerts* mentioned, in addition to the cases above cited for the appellant, *Henchett* v. *Kimpson* (2) and *Colyer* v. *Speer*. (3)]

Colyer v. *Speer* (3) is really an authority in favour of the trustee. It has long been settled that the title of the landlord cannot prevail against assignees in bankruptcy: *Gethin* v. *Wilks* (4); *Lee* v. *Lopes*. (5)

[LINDLEY M.R. referred to *Duck* v. *Braddyll*. (6)]

Goods seized under a writ of execution are in custodiâ legis, and therefore cannot be seized by the landlord: *Wharton* v. *Naylor*. (7) The authorities, when carefully examined, do not support the appellant's proposition that, as soon as an execution is levied by seizure and sale, the landlord is in the position of a secured or preferential creditor on the proceeds of sale. As to *Cocker* v. *Musgrove* (8), the foundation of the decision was not that the landlord gets a charge, but that the sheriff holds his hand until the rent is paid or provided for; if he does sell he is personally liable at the suit of the landlord for the

(1) 3 B. & A. 440.
(2) (1762) 2 Wils. 140.
(3) (1820) 2 B. & B. 67.
(4) (1833) 2 Dowl. 189.
(5) (1812) 15 East, 230.
(6) (1824) 13 Price, 455; M'Cl. 217.
(7) 12 Q. B. 673.
(8) 9 Q. B. 223.

C.A. 1899

MACKENZIE, *In re.* HERTFORDSHIRE (SHERIFF OF), *Ex parte.*

rent in arrear. *Henchett* v. *Kimpson* (1) is to the same effect, and shews that the statute of Anne must be construed literally: that is to say, until the rent is paid or provided for there are no goods upon which the sheriff can levy. If the sheriff sells before the rent is paid, he does so at his own risk. The Bankruptcy Acts, 1883 and 1890, reverted very much to the law under the Bankruptcy Act, 1849, which was based upon the Act of 6 Geo. 4, c. 16, and provided that the proceeds of an execution must be brought by the execution creditor into the common fund. If the landlord omits to distrain for his rent before the act of bankruptcy, he comes in with the other creditors. An execution creditor must, in order to obtain the fruits of his execution, levy before the act of bankruptcy; if you put the landlord in a different position, you make him a secured creditor in full, a position which would raise a difficulty on s. 1 of the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), for, if the landlord is to be paid in full out of the proceeds of execution, he is thereby given a priority as regards such proceeds over the preferential creditors, while he is postponed to them in the case of a distress. All the cases are reviewed in *In re M'Carthy* (2), referring to *In re Hudson* (3), which was a case like the present one.

Danckwerts, in reply. As to *Lee* v. *Lopes* (4), that decides that the landlord loses his right only if the execution is itself overridden by the bankruptcy, and he has not distrained. In *Gethin* v. *Wilks* (5) the point was not argued, for the landlord was not before the Court. *Duck* v. *Braddyll* (6) was under the old Bankruptcy Act, and no one appeared for the execution creditors; the decision proceeded on *Lee* v. *Lopes*. (4) *Duck* v. *Braddyll* (6), when properly considered, is in favour of the sheriff: Machell, p. 222. *In re M'Carthy* (2) was a case under the Irish Bankruptcy Act (35 & 36 Vict. c. 58, s. 54), but the judgment, so far as it goes, is in favour of the landlord. Under s. 11 of the Bankruptcy Act, 1890, the "costs of the execution" are to be a first charge on the goods or proceeds.

(1) 2 Wils. 140.
(2) 7 L. R. (Ir.) 473, 482.
(3) (1877) 1 L. R. (Ir.) 6.
(4) 15 East, 230.
(5) 2 Dowl. 189.
(6) 13 Price, 455; M'Cl. 217.

If the payment to the landlord is a payment necessarily incurred in order to make the execution fruitful, it does fall within the "costs of the execution."

[*Muir Mackenzie.* Sect. 73 of the Act of 1883 shews what are the costs under the Act.]

That section only deals with taxation.

Cur. adv. vult.

Aug. 4. The judgment of the Court (Lindley M.R., Sir F. H. Jeune P., and Romer L.J.) was delivered by

LINDLEY M.R. This is an appeal in bankruptcy raising important questions as to the right of a landlord to sue the sheriff for arrears of rent.

The facts are these. [The learned judge stated them, and continued:—] It will be convenient to consider (1.) the rights of a landlord as against his tenant's trustee in bankruptcy where there is no execution against the tenant; (2.) the rights of a landlord against a sheriff who has seized the tenant's goods where there is no bankruptcy; (3.) the rights of a landlord and of the sheriff where the goods of the tenant have been seized by the sheriff under an execution and the tenant has afterwards become bankrupt.

(1.) The bankruptcy of a tenant does not prevent a distress by the landlord. It was long ago decided that a commission of bankruptcy and possession by the assignees or the messenger did not place the tenant's goods in custodiâ legis so as to protect them from distress: Gilbert on Distress, 3rd ed. p. 44, *Anon.* (1), and *Briggs* v. *Sowry*. (2) If the landlord, having power to distrain, did not distrain and the goods were removed by the assignees, he could prove for his rent, and that was his only remedy. (2) Modern Bankruptcy Acts have not altered the law in this respect except that they have limited the right to distrain after bankruptcy to rent accruing six months or less before the date of the order of adjudication: Bankruptcy Act, 1883, s. 42; Bankruptcy Act, 1890, s. 28. Nothing in the present case turns on this limitation.

(2.) Next, as to executions. A tenant's goods, seized by a

(1) (1740) 1 Atk. 103. (2) (1841) 8 M. & W. 729.

C. A. 1899

MACKENZIE, *In re.* HERTFORDSHIRE (SHERIFF OF), *Ex parte.*

Lindley M.R.

sheriff under a writ of execution, could not be distrained for rent. They were said to be in custodiâ legis and protected from seizure by the landlord: Gilbert on Distress, 3rd ed. p. 40; *Wharton* v. *Naylor*. (1) Nor could he, before the statute of Anne, by giving the sheriff notice or otherwise, obtain payment by the sheriff out of the moneys realized by him by the sale of the goods seized. The law in this respect was, however, altered by 8 Anne, c. 14 (c. 18 in the Revised Edition of the Statutes), s. 1. This statute did not give the landlord a right to distrain, but it prohibited the removal of the goods seized by the sheriff until the landlord's rent in arrear (not exceeding one year's rent) had been paid by the execution creditor. The Act was so worded as to raise the question whether it imposed upon the sheriff the duty of ascertaining whether any rent was in arrear or not before allowing the goods seized to be removed; but it was early decided that it was not the sheriff's duty to inquire, and that he was under no liability to the landlord for not keeping the goods unless informed that rent was due: Gilbert on Distress; *Waring* v. *Dewberry* (2); *Palgrave* v. *Windham* (3); *Arnitt* v. *Garnett*. (4) But if the sheriff had notice before the goods were removed that rent was due to the landlord, and the sheriff, nevertheless, did not keep the goods on the premises, but sold them without paying the landlord, the sheriff was liable to an action by the landlord for the wrongful removal: *Riseley* v. *Ryle* (5); *Andrews* v. *Dixon* (6); *Colyer* v. *Speer*. (7) The Act in effect impounded the goods for the landlord's benefit; they could not be removed until he was paid. To this extent the Act in terms gave him a right to have them preserved as a security for one year's arrears due to him. He could not, however, require them to be sold for his benefit; and if they were sold he could not maintain an action against the sheriff for money had and received: *Green* v. *Austin*. (8) His remedy was by an action on the statute for wrongful removal without paying him: see a form of declara-

(1) 12 Q. B. 673.
(2) (1731) 1 Str. 97.
(3) (1733) 1 Str. 212.
(4) 3 B. & A. 440.
(5) (1843) 11 M. & W. 16.
(6) 3 B. & A. 645.
(7) 2 B. & B. 67.
(8) (1812) 3 Camp. 260.

tion, 2 Chitty's Pleadings, 629. If the execution creditor chose to pay the landlord, the goods were sold by the sheriff, and he applied the proceeds in paying his own expenses and the judgment debt and the amount paid by the execution creditor to the landlord for the rent in arrear. The Act itself authorized this.

But unless the execution creditor or the tenant paid the landlord his rent in arrear (not exceeding one year's arrears), the Act might produce a deadlock. If the sheriff sold the goods and they were removed, he was liable to an action by the landlord: see, as to the damages recoverable, *Thomas* v. *Mirehouse*. (1) So long as the landlord was unpaid, the sheriff could not be compelled to sell the goods; and an action by an execution creditor for not selling could not be sustained against him: *Cocker* v. *Musgrove*. (2) The sheriff might retain possession; but when it becomes plain that no one would pay the landlord, the sheriff could withdraw and return nulla bona to the writ: see *Thomas* v. *Mirehouse* (1) and *Wintle* v. *Freeman*. (3) As soon as he withdrew the landlord could distrain for his whole rent in arrear.

Such were the strict rights of the parties. But now suppose the sheriff sold and deprived the landlord of what was practically his lien on the goods, and then, to save himself from an action by the landlord, paid him out of the proceeds of the sale or handed the proceeds of the sale in part discharge of the rent due to him. Strictly speaking, this would be irregular unless the landlord consented; but, even if he did not, still no one would be damnified if the sale was fairly conducted. The landlord would have nothing to complain of, for he would get his money, so far, at all events, as the goods seized could be made available for his payment. The execution debtor would not be damnified, for he owed the rent, and he could not get his goods without paying it. The execution creditor would not be damnified, for he could not get paid without satisfying the landlord. Hence it became the practice for the sheriff to sell and to pay the landlord; and it was held that, if the sheriff

(1) (1887) 19 Q. B. D. 563. (2) 9 Q. B. 223.
(3) 11 Ad. & E. 539.

C. A. 1899

MACKENZIE, *In re.* HERTFORDSHIRE (SHERIFF OF), *Ex parte.*

Lindley M.R.

sold without paying the landlord, the landlord, instead of bringing an action against the sheriff on the statute, might apply to the Court for and obtain a rule—that is, an order for payment out of the proceeds of sale: *Henchett* v. *Kimpson* (1) and *Arnitt* v. *Garnett*. (2) This mode of procedure became the common practice; and if the sheriff had notice of the landlord's claim before the proceeds of sale were parted with, the landlord could, if in time, obtain payment out of the proceeds: *Yates* v. *Ratledge* (3); and if too late, he could sue the sheriff for removing the goods without paying him: *Andrews* v. *Dixon*. (4) The right of the landlord to be paid out of the proceeds of the sale thus became recognised and established where no bankruptcy intervened.

(3.) Do the Bankruptcy Acts deprive the landlord of the right acquired in the manner above described? In one case we think they do, but only in one—namely, where the execution is itself overridden and rendered void by the bankruptcy and the landlord has not distrained: see *Lee* v. *Lopes* (5); *Gethin* v. *Wilks*. (6) In the present case the execution is not overridden so as to make it and the sale under it invalid. Sect. 1 of the Bankruptcy Act, 1890, is qualified by s. 46, clause 3, of the Bankruptcy Act, 1883, and the landlord was prevented by the execution from distraining. There is no provision in the Bankruptcy Acts which can deprive the sheriff of his right or the landlord of his, unless it be s. 11 of the Bankruptcy Act, 1890. Clause 1 of that section does not apply, for the sale preceded the notice of the receiving order. But we are by no means satisfied that s. 11, clause 1, which is a general enactment, repeals the statute of Anne, which is a special enactment applicable to a particular case.

Sect. 11, clause 2, is the enactment which is relied upon in this case against the sheriff. But this section has not, in our opinion, rendered it wrong for him to pay the landlord that which the sheriff had a right to pay him for his own indemnity, and that which the landlord had a right to have paid him in

(1) 2 Wils. 140.
(2) 3 B. & A. 440.
(3) 5 H. & N. 249.
(4) 3 B. & A. 645.
(5) 15 East, 230.
(6) 2 Dowl. 189.

lieu of his right to sue on the statute of Anne. There is not a word in the clause which shews that the special case provided for by the statute of Anne was being dealt with; and the concluding words of the clause tend strongly to shew that it was not. The expression "goods of a debtor" is used; but there is nothing to shew that the enactment applies to goods of a debtor which are subject to the rights of persons other than the execution debtor and execution creditor, and to override such rights. The section deals with the rights of the execution creditor, the execution debtor, and the sheriff when he has no legal duties to third parties; but the section is limited to ordinary cases of execution. Goods which belong to a judgment debtor and are seized by the sheriff, but which are impounded by the statute of Anne until the landlord is paid, are not "goods of a debtor" which have to be handed over by the sheriff to the trustee in bankruptcy under s. 11. Nor are the proceeds of sale of such goods to be handed over free from the rights of the landlord or of the sheriff for his own indemnity. Even if the trustee in bankruptcy can require the sheriff to hand over the goods or proceeds, we see nothing to displace the right of the landlord under the statute of Anne to have those goods kept unremoved, or his right, sanctioned by long practice, to be paid out of the proceeds if they have been removed and sold contrary to the statute. This was the conclusion arrived at by the Court of Appeal in Ireland in *In re M'Carthy* (1), and is in accordance with *Duck* v. *Braddyll* (2), if we understand that case rightly. The judgment in *In re M'Carthy* (1) really concludes this case, so far as an Irish decision can conclude an English one on similar Acts of Parliament. But as *In re M'Carthy* (1) is not technically binding on this Court, we have thought it necessary to look into the authorities; and, having done so, we have come to the conclusion that that decision is in accordance with the English Bankruptcy Acts, and we follow it accordingly.

It is said that *Gethin* v. *Wilks* (3) is opposed to this view. We can understand that case if the execution was overreached

(1) 7 L. R. (Ir.) 473. (2) 13 Price, 455; M'Cl. 217.
(3) 2 Dowl. 189.

C. A. 1899

MACKENZIE, *In re.* HERTFORDSHIRE (SHERIFF OF), *Ex parte.* Lindley M.R.

by the bankruptcy so that the landlord could distrain, but it is unintelligible unless this were the case. The execution was clearly treated as void, and that is the explanation of the case.

Lee v. *Lopes* (1) is open to the same observation; but, in addition, the landlord was the execution creditor, and had, by issuing execution, lost his right to distrain and the benefit of the statute.

The conclusion thus arrived at is in accordance with common sense. The trustee in bankruptcy claims the proceeds of the sale of the goods which have been properly sold only if the landlord is to be paid out of the proceeds: the trustee can only claim the benefit of the sale subject to those rights. The sheriff has paid the landlord, and is entitled to deduct the amount before he pays over the balance to the trustee. The appeal must be allowed with costs here and below.

Muir Mackenzie. As to costs, I submit that a trustee in bankruptcy who is respondent to a successful appeal should not be ordered to pay the costs personally. The costs should only come out of the estate: *Ex parte Stapleton.* (2)

LINDLEY M.R. I do not think the practice is so settled as that. The Court must consider what is the trustee's right in each particular case. Our order now is that the appeal must be allowed with costs.

Appeal allowed.

Solicitors: *Avery & Son; Wetherfield, Son & Baines.*

(1) 15 East, 230.

(2) 10 Ch. D. 586.

G. I. F. C.

1899
Aug. 7, 10.

In re HOOLEY.
Ex parte UNITED ORDNANCE AND ENGINEERING COMPANY, LIMITED.

Bankruptcy—Contract to take Shares in a Company—Disclaimer by Trustee in Bankruptcy—Proof for Injury caused by Disclaimer—Measure of Damages—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55.

By a contract made in February, 1898, H. agreed to sell to a company certain properties; and by the same contract H. agreed to subscribe and pay for in cash so much of the share capital of the company as should not be taken up by the public. In the events which happened H. became bound under the contract to take up and pay for certain preference shares and 25,000 ordinary shares of 1*l.* each in the company. In June, 1898, H. became bankrupt, and in the July following his trustee in bankruptcy disclaimed the contract. Soon afterwards the company went into liquidation, and the liquidator lodged a proof against H.'s estate for damages for breach of the contract. H.'s estate was estimated to realize not more than 4*s.* in the pound. The liabilities of the company were about 16,000*l.*, whilst its assets comprised, practically, about 4000*l.* at a bank and the claim against H.'s estate. The liquidator made a call of 1*l.* per share on the ordinary shares of the company, and claimed that the proof against H.'s estate should stand at 25,000*l.*, on the ground that the measure of damages for the injury caused to the company by the disclaimer was the loss of the call of 1*l.* per share on the 25,000 shares which H. was bound to take up. The trustee admitted the proof for 10,500*l.* only, that being the difference between the then estimated assets and liabilities of the company.

On appeal:—

Held, that, as the disclaimer had put an end to the contract, and the claim of the company could only be for damages for breach of the contract, the trustee had assessed the damages on the right principle, and that the proof must stand at 10,500*l.*

THIS was an appeal against the decision of the trustee rejecting a proof against the estate of the bankrupt.

On January 29, 1898, the United Ordnance and Engineering Company, Limited (hereafter called the company), was registered with the object, amongst others, of entering into the agreement next after stated and of acquiring the property therein mentioned. The capital of the company was 550,000*l.* divided into 275,000 preference shares and 275,000 ordinary shares of 1*l.* each. By an agreement dated February 2, 1898,

1899

HOOLEY, *In re.* UNITED ORDNANCE AND ENGINEERING COMPANY, *Ex parte.*

and made between E. T. Hooley (as vendor) of the one part and the company of the other part, E. T. Hooley agreed to sell and the company agreed to purchase certain properties for 550,000*l.* By clause 4 the 550,000*l.* was to be paid or satisfied, as to 250,000*l.* by means of a debenture issue for that amount, as to 50,000*l.* out of the issue of the preference shares, and as to the balance of 250,000*l.* out of the issue of the ordinary shares. By clause 5 E. T. Hooley agreed to subscribe and pay for in cash at par so much of the balance of the preference and ordinary share capital (after payment of the said sums of 50,000*l.* and 250,000*l.* as provided by clause 4) as should not be taken up by other subscribers in the public issue. On February 3, 1898, the prospectus was issued to the public, but was not adequately responded to. On February 15 the board informed E. T. Hooley of the result of the public subscription, and requested him to fulfil his obligations under clause 5 of the agreement of February 2. On February 17 E. T. Hooley gave a letter to the directors by which, in consideration of the board going to allotment, he agreed to pay within two months 175,000*l.* towards the working capital of the company, and also to find a further sum of 10,000*l.* for certain purposes. The directors accepted this letter and went to allotment. Mr. Hooley, however, only paid 2000*l.* of the 10,000*l.*, and was not in a position to carry out the agreement of February 2.

In March and May, 1898, the company commenced actions against E. T. Hooley for specific performance of the agreements of February 2 and 17. In June, 1898, a receiving order was made against E. T. Hooley and adjudication followed, and the actions were stayed. In July, 1898, the company lodged a proof against the bankrupt's estate for 175,000*l.* and 8000*l.*, making together 183,000*l.*, based on the letter of February 17, 1898. In this proof the company also claimed damages (no specific sum being mentioned) for breach of the agreement of February 2, 1898.

In October the trustee in bankruptcy gave the company notice that he disclaimed all interest in the agreement of February 2, 1898, but no express disclaimer was made of the agreement of February 17, 1898.

1899

HOOLEY, *In re.* UNITED ORDNANCE AND ENGINEERING COMPANY, *Ex parte.*

In November the company went into voluntary liquidation, and a liquidator was appointed.

On January 3, 1899, the trustee gave the company notice that he rejected the claim of the company against the bankrupt's estate to the extent of 177,000*l.*, on the ground that the company had suffered loss for which the bankrupt's estate was liable to the extent of 6000*l.* only (afterwards increased to 7500*l.*), at which amount he admitted the proof.

On January 20, 1899, the liquidator settled the list of contributories of the company, and included the trustee in bankruptcy, as representing the bankrupt's estate, as a contributory in respect of 25,000 ordinary and 225,000 preference shares—this being the amount of shares which the bankrupt was bound to subscribe for under clause 5 of the agreement of February 2—although the shares had not been formally allotted to the bankrupt.

On January 31 the trustee in bankruptcy took out a summons in the winding-up to have his name removed from the list of contributories.

On February 2 the liquidator made a call of 1*l.* a share on all the ordinary shares, except in so far as they had been previously paid; and on February 13 he, under legal advice, returned to the debenture-holders and preference shareholders the sums which they had respectively subscribed. It appeared that the company's liabilities amounted to about 16,000*l.*, and its only assets were—(*a*) a sum of 4000*l.* at a bank, being chiefly subscriptions of holders of ordinary shares; (*b*) the claim against the bankrupt's estate; and (*c*) a small amount of uncalled capital.

On April 18 an appeal by the liquidator against the trustee's rejection of his proof was heard by Wright J., who held that the agreement of February 2 and the letter of February 17 were not separate contracts, but formed one contract; that the letter of February 17 must be treated as supplemental to and a modification of the agreement of February 2; and that the proof could not be allowed at 183,000*l.*, but must stand as a claim for damages against the bankrupt's estate for breach of the contract. The learned judge also intimated that the

1899

HOOLEY, *In re.* UNITED ORDNANCE AND ENGINEERING COMPANY, *Ex parte.*

trustee had not sufficiently considered the amount of damages, and referred the proof back to him for reconsideration. On May 13 this decision of Wright J., on an appeal by the liquidator, was affirmed. (1)

(1) The following judgments were delivered by the Court of Appeal:—

LINDLEY M.R. I think that this case is by no means free from difficulty, but on the whole I am unable to differ from the view arrived at by Wright J. The reasons are not very difficult to explain. The difficulty arises from the operation of the disclaimer under s. 55 of the Bankruptcy Act, and its application to the present case. First of all, one has to consider the contract between the parties. The contract between the parties is contained in the two documents of February 2 and 17. [The learned judge then dealt with the documents and facts, and after holding that the sums which Mr. Hooley was to pay under the letter of February 17, and which came to 175,000*l.*, were not to be paid except in respect of shares which he was to have, and that they were the total consideration for those shares, continued as follows:—] That being the case, when Mr. Hooley's trustee disclaims all his interest under the contract, the whole of the consideration for the 175,000*l.* is gone. Now comes the question whether the whole of that 175,000*l.* is nevertheless payable to the liquidator of this company. That seems to me to be a very strange result; and, when you look at the effect of the disclaimer on this contract, I think we are bound to say that the natural meaning and the true and legal result is that all that can be proved for is damages. I think that that is right, and that is the view taken by the learned judge below. I quite agree that but for the disclaimer there might have been very considerable difficulty about the matter. Mr. Muir Mackenzie has satisfied me that it is possible that they might have got the money; but it cannot be right that they should have the money when the total consideration for it is gone. It is not like the case of a lease in which there is rent in arrear, the consideration having been enjoyed and the rent in arrear being payable. Of course, the disclaimer of the lease is a disclaimer of future liability. But suppose, instead of an ordinary lease for paying rent, a person had agreed to buy a lease and pay a premium for it, and pay no rent at all, and before he completed that agreement he became bankrupt, and his trustee disclaimed the lease, so that the total consideration for the premium had gone. Then I cannot see that the premium could be recovered. It strikes me that upon the disclaimer there would be a right to damages, and nothing more. I base my judgment entirely upon the apparently gross anomaly and gross injustice of saying that where the whole consideration on one side for a simple contract like this fails, yet nevertheless the whole consideration on the other side is payable. I cannot bring my mind to that point, and that, as I understand it, was really the view taken by Wright J.

Now, as to the alternative view, I do not think there is much difficulty about it. The alternative view is this—that nevertheless we ought to say that 175,000*l.* is payable under the disclaimer clause in the Bankruptcy Act. It is quite obvious to

On July 13 the trustee gave the liquidator notice that he admitted the proof at 10,500*l.*, which figure he arrived at as follows:—

	£	*s.*	*d.*	£	*s.*	*d.*
"Gross amount the company claims it has to pay				16,169	2	0
"Deduction in respect of cash in hand	4000	0	0			
"Deduction in respect of lump sum for costs, for directors' fees, &c., and possible recovery of assets	1669	2	0	5,669	2	0
				£10,500	0	0."

The liquidator appealed against this decision of the trustee,

my mind that it is impossible for us to say upon the materials before us that the liquidator would be entitled to make a call on Mr. Hooley's estate for 175,000*l.* Nothing of the sort. He would be entitled to far less, and we cannot fix the sum. I agree that whatever he is entitled to call up, he is entitled to prove for. That is a sum which we cannot possibly fix at this moment; and it appears to me that that would come out under the order of Wright J. without any alteration at all. He will get his rights whatever they are, but his rights are not—and this is the great struggle—that he is entitled to prove for 175,000*l.*, either as a debt or as unliquidated damages. I do not think it is anything of the kind. As to the sum of 8000*l.*, which was tacked on to the 175,000*l.*, so as to make 183,000*l.*, I think that it is a claim for breach of a contract to lend money.

The result, therefore, is that, in my opinion, the judgment of Wright J. is right. Not a word is said about the amount of damages, nor do I say anything. They may be very much more than has at present been allowed by the trustee. What the amount may be is another matter. It must be reconsidered. The decision at which I have arrived is that the struggle here to prove for 175,000*l.* or 183,000*l.* cannot be supported; and, that being so, the appeal must be dismissed in the usual way.

RIGBY L.J. I am of the same opinion. I cannot understand a disclaimer given by law which will put an end entirely to the consideration on which money is to be paid, and yet will leave the bankrupt's estate liable as if there were no disclaimer. On that ground, and for the reasons expressed by the Master of the Rolls, I agree.

COLLINS L.J. I am of the same opinion.

1899

HOOLEY, *In re.* UNITED ORDNANCE AND ENGINEERING COMPANY, *Ex parte.*

insisting that the proof ought to stand for 25,000*l.*, being the amount of the call of 1*l.* per share on the 25,000 ordinary shares in respect of which the trustee had been placed on the list of contributories.

This appeal, and the trustee's summons for the removal of his name from the list of contributories, now came on for hearing together.

It was agreed between the parties that if the liquidator failed in his contention then the proof was to stand for 10,500*l.*; but if the Court was of opinion that he was entitled to prove in respect of the 25,000 ordinary shares, then the proof should be admitted for 25,000*l.*, or for such smaller sum, not being less than 10,500*l.*, as the Court should direct.

It was stated that the bankrupt's estate would probably realize not more than 4*s.* in the pound.

Muir Mackenzie, and *Gore-Browne*, for the liquidator. The question is whether, under s. 55 of the Bankruptcy Act, 1883, the proof is to be allowed at 25,000*l.*, or only at 10,500*l.* In other words, whether or not the true measure of the injury that the company has sustained by the trustee's disclaimer of Hooley's contract is the loss of the call of 1*l.* per share on the 25,000 ordinary shares. The company was not in liquidation when the trustee disclaimed, so that at that time the company had a contract under which Hooley was in the position of an underwriter and bound to take up and pay for these shares, and the fact that his name was not on the register in respect of them is immaterial: *Ex parte Audain.* (1) If there had been no disclaimer, the liquidator could have put the trustee on the list of contributories for these shares, and could have proved against the bankrupt's estate for the call on the shares: *In re West of England Bank.* (2) The loss occasioned by the disclaimer, therefore, is the loss under the contract of the call of 1*l.* per share on the shares. The Master of the Rolls in his judgment in the Court of Appeal on May 13 last said: "Whatever the liquidator is entitled to call up, he is entitled to prove for." The liquidator relies on that dictum; and on the case of

(1) (1889) 42 Ch. D. 1. (2) (1879) 12 Ch. D. 288.

In re Hallett (1) where the trustee in bankruptcy disclaimed the bankrupt's shares in a company, and a claim by the company to prove for the full amount uncalled on the shares was allowed. Here, some 11,000*l.* is required, in addition to the assets in hand, to pay the debts of the company in full, and a dividend of 4*s.* in the pound on the 10,500*l.* will be wholly insufficient for that purpose. The liquidator in making the call was entitled to take into consideration the amount required, and the fact that Hooley was bankrupt and that his estate would only pay a small dividend. But if the trustee's contention is to prevail, the company will practically get only a dividend upon a dividend, which the Legislature could never have intended.

H. Reed, Q.C., W. F. Hamilton, and *Carrington,* for the trustee. The construction of s. 55 has not much to do with the case. The Court of Appeal has decided that the only proof to be allowed here is a proof for damages. The present application is an attempt to get specific performance of the agreement of February 2, which was put an end to by the disclaimer. The whole consideration for it is gone, and all that remains is a claim for damages for breach of the contract which have been agreed at 10,500*l.*, unless there is a right to prove for the 25,000*l.* The trustee has been improperly placed on the list of contributories.

[They were stopped.]

Muir Mackenzie, in reply.

WRIGHT J. I should have entirely agreed with what was argued by Mr. Muir Mackenzie and Mr. Gore-Browne on the construction of the section, supposing that they were entitled to treat as damages in this matter the amount of the 25,000 shares, and to say that the call upon those shares is lost by the disclaimer. I think it is clear that the whole 25,000 would be provable in the bankruptcy, and not the mere dividend on that which might have been got, if there had been no disclaimer. If the claim now put is on a right basis, that is to say, as amounting to the sum which could have been

(1) (1894) 1 Manson, 380.

1899

HOOLEY, *In re.* UNITED ORDNANCE AND ENGINEERING COMPANY. *Ex parte.*

Wright J.

called up against Mr. Hooley on the 25,000 shares, then the whole 25,000*l.* would be provable. The question is, whether that is a right basis of claim. I do not think it is. It seems to me that the figure of 25,000*l.*, as representing these shares which Mr. Hooley was bound to take, is one which is got at only under the contract, and that figure is got rid of by the disclaimer of the contract, and only damages remain. Then it seems to me that, if in making out the damages you go back to the liability to take up 25,000 shares, that is exactly what the Court of Appeal decided could not be done: it is the wrong measure. It is really seeking something like specific performance, in effect, as to those 25,000 shares. I do not know how far the figures which the trustee has arrived at are correct in themselves—I understand, however, from the correspondence, that they are not questioned—but so far as the principle goes it appears to me that he has gone on a right principle as against what the liquidator contends. That being so, the proof will stand at 10,500*l.*, which is the amount assessed by the trustee. As to the costs, I do not think the liquidator ought to pay the costs of this application. It is a very complicated matter, but the trustee will take his costs out of the estate.

Reed, Q.C. I must ask for an order on the trustee's summons to take his name off the register, with costs.

Muir Mackenzie. I cannot resist that.

WRIGHT J. There will be an order in the terms of the summons, with costs.

Solicitors for liquidator: *Ashurst, Morris & Co.*

Solicitors for trustee: *Golding & Hargrove.*

H. L. F.

In re NEWMAN.
Ex parte THE OFFICIAL RECEIVER.

1899
Aug. 10.

Bankruptcy—Practice—Trustee in Bankruptcy—Vacating Office—Receiving Order against Trustee—Rescission of Receiving Order—Restoration—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 85, 86, 87.

The 85th section of the Bankruptcy Act, 1883, provides that "if a receiving order is made against a trustee in bankruptcy he shall thereby vacate his office of trustee."

A receiving order was made against a trustee in bankruptcy, but was soon after rescinded on the ground that it ought never to have been made. A new trustee had not in the meantime been appointed:—

Held, that the trustee was restored to his original position.

THIS was a motion by the official receiver for an order that W. L. Hurt might be directed to hand over to him all the property and effects forming the estate of the bankrupt Newman, and all books, papers, and documents relating thereto.

In March, 1894, a receiving order was made against Newman, and adjudication followed. In June, 1894, W. L. Hurt, an accountant, was appointed trustee in the bankruptcy, and in July following his appointment was duly certified by the Board of Trade, and since that date he had acted as the trustee in the bankruptcy.

On March 24, 1899, a receiving order was made against W. L. Hurt; but on the same day the advertisement of the receiving order was, on his application, stayed, and the petition was directed to be reheard.

On March 30 the receiving order was rescinded on the ground that it never ought to have been made.

On April 6 the inspector-general in bankruptcy applied to W. L. Hurt to hand over all the property of the bankrupt Newman, and all books and papers relating to the same, on the ground that by virtue of s. 85 he had vacated his office. W. L. Hurt declined to comply with this request, and thereupon the present motion was launched. No steps had been taken by the crediters of Newman to appoint another trustee in the place of W. L. Hurt.

1899

NEWMAN, *In re.* OFFICIAL RECEIVER, *Ex parte*

Muir Mackenzie, for the official receiver. This application raises an important point of practice under s. 85 of the Act. There is no provision in the Act expressly providing for the rescission of a receiving order; but the Court in the exercise of its general jurisdiction under s. 104 of the Act can rescind a receiving order: *In re Izod.* (1) The 85th section is positive in its terms. It says that when a receiving order is made against a trustee "he shall thereby vacate his office," and contains no provision that he shall be reinstated in office if the receiving order is rescinded. Then s. 87 provides for the appointment of a new trustee when a vacancy occurs, and directs that the official receiver shall act as trustee during the vacancy. The 22nd section provides that when a member of the committee of inspection is adjudged bankrupt he vacates his office, and directs that the vacancy shall forthwith be filled up. Then the 32nd section, which enumerates the disqualifications of a debtor for certain positions when adjudged bankrupt, provides that the disqualifications shall be removed and cease if and when the adjudication is annulled. If the Legislature had intended that the effect of the rescission of a receiving order against a trustee in bankruptcy was to reinstate him in his office, it would have so provided in s. 85. But the section stands alone. It would lead to great difficulty and confusion if, after a receiving order has been made against a trustee and a new trustee has been appointed, that then, on the receiving order being rescinded, the original trustee should claim to be again the trustee.

[WRIGHT J. referred to *Smith* v. *Gronow.* (2)]

The analogy of those cases applies where a life interest is given under a will or settlement determinable on the bankruptcy of the life tenant: *White* v. *Chitty* (3); *In re Parnham's Trusts.* (4) Here, as soon as the receiving order was made, the trustee vacated his office, and the subsequent rescission of the order did not restore him to his office, nor oust the official receiver, nor deprive the creditors of their right to elect another trustee.

(1) [1898] 1 Q. B. 241.
(2) [1891] 2 Q. B. 394.
(3) (1866) L. R. 1 Eq. 372.
(4) (1872) L. R. 13 Eq. 413.

1899

NEWMAN, *In re.* OFFICIAL RECEIVER, *Ex parte.*

Hansell, for the trustee. The principle is that when an adjudication is annulled the debtor is remitted to his original position. That was the practice under the Bankruptcy Act, 1869: *Bailey* v. *Johnson* (1); *Crew* v. *Terry*. (2) The same principle applies to a receiving order. There is a difference between a trustee vacating his office and being removed from office. Sect. 85 applies to a vacancy, and s. 86 to a removal, and then s. 87, sub-s. 4, says that during a vacancy the official receiver shall *act* as trustee, not *be* the trustee. Similar words occur in s. 70. The cases cited as to forfeiture of life estates on bankruptcy do not apply. Here, the receiving order was rescinded on the ground that it ought never to have been made, and therefore ought to be taken as not having been made at all.

Muir Mackenzie, in reply.

WRIGHT J. It seems to me that this particular case is free from difficulty. A receiving order was made against the trustee in bankruptcy, and thereupon by virtue of s. 85 of the Act he vacated his office. Then, within a very short time afterwards, that receiving order was rescinded. The Court was satisfied that there was no valid petitioning creditor's debt, and rescinded the receiving order on the ground that it ought never to have been made. In such a case as that the common sense view is that primâ facie the trustee ought to be restored to his original position subject to any new rights which may have come into existence in the interval. If any new rights arise they would have to be taken into consideration. If no new rights arise, which seems to be the case here, then I think that under the circumstances I ought to hold that the receiving order was rescinded ab initio, and should be treated as though it never had been made. I think, therefore, that the trustee was restored to his original position, and that this application must be dismissed. The trustee will take his costs out of the estate.

Solicitor for official receiver: *Murton.*

Solicitor for trustee: *H. H. Fanshawe.*

(1) (1872) L. R. 7 Ex. 263. (2) (1877) 2 C. P. D. 403.

H. L. F.

C. A.
1899
Aug. 9.

[IN THE COURT OF APPEAL.]

DALGLEISH *v.* LOWTHER.

Practice—Interrogatories—Action for Slander—Rules of Supreme Court, Order XXXI., *rr.* 1, 6.

In an action for slander the plaintiff administered the following interrogatories to the defendant:—

"Did you on or about the 1st of March, or when, speak the following words of the plaintiff" (setting out the words alleged in the statement of claim to have been spoken by the defendant of the plaintiff), "or words to that effect?

"Were the said words spoken in the presence of" (two persons named in the statement of claim), "and other persons, or any and which of them?"

Held, that these were proper interrogatories, and that the defendant must answer them.

Decision of Lawrance J. reversed.

APPEAL against an order of Lawrance J. reversing an order of the master, which had directed the defendant to file a further and better answer to interrogatories administered by the plaintiff.

The action was brought to recover damages for slander.

The plaintiff was a director of two companies, and was also a justice of the peace, and he was in March, 1899, a candidate for election as a member of a parish council.

The defendant resided in the parish and was a magistrate.

The plaintiff's statement of claim contained the following paragraphs:—

"On or about March 1, 1899, the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say, 'I referred to Whitehaven, where he' (meaning the plaintiff) 'was under my great-uncle and was discharged because of his' (meaning the plaintiff's) 'bankruptcy.'

"The defendant meant thereby that the plaintiff had been adjudged a bankrupt and was still an undischarged bankrupt, and that accordingly owing to his financial position he was unfit to fill the office of such director, or to occupy any position of trust.

"The defendant also meant thereby that the plaintiff was disqualified from holding the office of magistrate and from being a candidate for the said election, and that, even if not so disqualified, he was an unfit person to hold such positions."

The plaintiff gave the following particulars:—

"The said words were spoken in the hearing of Mr. William Houghton and of Mr. Hives, and other persons whose names are unknown to the plaintiff" at a time and a place specified.

By his defence the defendant denied that he had spoken or published the words alleged, and he denied that the words (if spoken) bore the meaning attributed to them by the plaintiff.

The plaintiff administered the following interrogatories for the examination of the defendant:—

"Did you on or about the 1st of March, or when, speak the following words of the plaintiff, 'I referred to Whitehaven, where he was under my great-uncle and was discharged because of his (meaning the plaintiff's) bankruptcy,' or words to that effect?

"Were the said words spoken in the presence of Mr. William Houghton and Mr. Hives and other persons, or any and which of them?"

By the defendant's affidavit in answer to the interrogatories he said: "I object to answer the said interrogatories as I am advised they are not admissible on the following grounds, amongst others, that they are of a fishing character, and seek to discover the evidence I intend to adduce in support of my case, and also that they are unreasonably wide, oppressive, and in fact irrelevant."

The master ordered the defendant to file a further and better affidavit. On appeal to Lawrance J. (in chambers) he reversed the decision of the master.

The plaintiff appealed.

Poyser, for the plaintiff. The authorities shew that such interrogatories may be put.

[He was stopped by the Court.]

Bonsey, for the defendant. Interrogatories in such a form are new in the Queen's Bench Division. The defendant could

C. A. 1899

DALGLEISH v. LOWTHER.

not answer them without stating what he said about the plaintiff. It must be a matter of opinion whether the words which he used were to the same effect as those alleged by the plaintiff. In an action of slander the plaintiff must stand by the words which he alleges to have been spoken by the defendant. Before the Judicature Act it was held that interrogatories in such a form were not admissible in a slander action: *Stern* v. *Sevastopulo*. (1) In *Atkinson* v. *Fosbroke* (2) a similar interrogatory was allowed, because the plaintiff satisfied the Court by affidavit that an imputation of forgery had been made against him by the defendant, and the persons present when it was made refused to give the plaintiff any further particulars.

There is no reported case since the Judicature Act in which such interrogatories have been allowed in a slander action.

[LINDLEY M.R. Rule 1 of Order XXXI. provides that "in any cause or matter the plaintiff or defendant by leave of the Court or a judge may deliver interrogatories for the examination of the opposite parties."]

The Court has a discretion, and as a general rule interrogatories ought not to be allowed in an action for slander. It would be oppressive to allow the interrogatories in the present case, for it is clear that the plaintiff is in doubt as to what was said, and to what persons. The defendant is not bound to answer at all if the interrogatories are in any respect wrong in form. He may properly object to answer "any and which of them." Notwithstanding the allowance of interrogatories by a judge, the defendant is at liberty to take any proper objection to answering: *Peek* v. *Ray* (3); Order XXXI., r. 6.

These interrogatories are oppressive, and so the learned judge thought. If they were answered the plaintiff might be able to amend his statement of claim as regards the words uttered by the defendant.

Poyser, in reply. In *Atkinson* v. *Fosbroke* (2) the plaintiff did not know the words which the defendant had used.

(1) (1863) 14 C. B. (N.S.) 737. (2) (1866) L. R. 1 Q. B. 628.
(3) [1894] 3 Ch. 282.

LINDLEY M.R. We have consulted our colleagues in the other Division of this Court, and they take the same view which we do, and which we expressed in the course of the argument, namely, that the grounds assigned by the defendant for not answering these interrogatories are wholly insufficient, and that he must put in a further and better answer. Lawrance J. took a different view upon the ground, as I understand him, that these interrogatories were fishing, or oppressive or unnecessary. But, looking at the statement of claim and at the interrogatories, we cannot think that they are fishing, or that they seek to discover the evidence which the defendant intends to adduce in support of his case, or that they are unreasonably wide, oppressive, or irrelevant. This is an action of slander. The alleged slander is set out in the statement of claim, and there is this further statement, under the heading of "Particulars"—that the words alleged were uttered in the presence of two persons who are named. The interrogatory which was allowed by the master is this: "Did you on or about the 1st March, or when, speak the following words of the plaintiff" (then the words are set out), "or words to that effect?" What objection there can be to that I am at a loss to conceive. In the general order relating to interrogatories there is nothing which will justify the defendant in refusing to answer this interrogatory. There are certain well-known grounds upon which a defendant may decline to answer interrogatories which the plaintiff has obtained leave to administer, as, for example, that the answer would tend to incriminate himself; but the grounds which are stated here are utterly insufficient. They are really no grounds at all. Of course, if the interrogatories were fishing or were, as the defendant says, oppressive, there would be something in his objection; but there is nothing of the kind.

The second interrogatory is this: "Were the said words spoken in the presence of" two persons named, "and other persons, or any and which of them?" The defendant need not trouble himself much about "any or which of them"; the substance of the interrogatory is this: "Did you say these words in the presence of these persons, or what others, that you

C. A. 1899

DALGLEISH v. LOWTHER.

Lindley M.R.

know of?" There is no harm in that. It was urged that the defendant might possibly object to some portion of the interrogatory, "or any and which of them," and that for that reason he is justified in refusing to answer at all. That is a line of defence which is quite new to me, and it is utterly unwarranted both in practice and on principle. The defendant must take each question by itself, and if he objects to answer any question he must say why. He cannot decline to answer one question because there is some other question to which he may object. In my opinion the learned judge has taken a view far too favourable to the defendant, and too lenient in point of principle. The appeal must be allowed and the order of the master restored. The costs will be the plaintiff's in any event.

SIR F. H. JEUNE. I agree. I think it is clear that for some time past interrogatories of this kind have been allowed. If there is any question of incriminating the defendant, he is at liberty to take that objection; but it seems to me idle to object to a question because at the end of the special words there is added, "or words to that effect." The object of that addition is merely to prevent the defendant from swearing by the card; and if he has not used the words alleged, or anything in substance like them, he is in no way oppressed, because he can say that he did not use those words, or words which, though not exactly the same, are to that effect.

Appeal allowed.

Solicitors: *Collisson, Prichard & Barnes, for J. E. Atter, Stamford; Ellis & Ellis.*

W. L. C.

ATTORNEY-GENERAL *v.* SMITH-MARRIOTT.

1899
July 26.

Revenue—Estate Duty—Annuity—Change of Security—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*b*); *s.* 3, *sub-s.* 1.

The defendant was the owner of freehold estates in the county of L., and he was also the tenant for life of freehold estates in the county of D. The L. estates were charged with the payment of an annual jointure rent-charge. The person entitled to this rent-charge, by agreement with the defendant in 1883, released the L. estates, and the defendant in consideration granted to her an annuity charged on his life interest in the D. estates, and secured by policies of assurance on his life. On the death of the annuitant the Crown claimed estate duty from the defendant under s. 2 of the Finance Act, 1894:—

Held, that the Crown was entitled to the duty, since the transaction in 1883 was not the grant of an annuity for full consideration in money or money's worth paid to the grantor for his own use or benefit within the meaning of s. 3 of the Finance Act, 1894, but merely a transfer of the security for the jointure rent-charge from the L. estates to the D. estates.

INFORMATION by the Attorney-General.

By an indenture dated May 25, 1853, Sir J. J. Smith, Bart., voluntarily, in exercise of a power of jointuring given to him by an indenture of settlement dated July 3, 1813, granted to the use of Dame Frances Smith, his wife, an annual sum or yearly rent-charge of 400*l.*, to be issuing and payable out of certain hereditaments in the county of Lincoln, subject to the uses of the said indenture of July 3, 1813, to hold, receive, and take the same from the time of the death of the said Sir J. J. Smith unto the said Dame Frances Smith and her assigns during her life for her jointure, and to be payable by equal quarterly payments, tax free and without any deductions, on the several quarterly days mentioned in the indenture, with the usual powers and remedies for distress and entry for the recovery thereof. And Sir J. J. Smith at the same time demised the hereditaments charged with the payment of the said jointure rent-charge of 400*l.* unto certain persons, their executors, administrators, and assigns, for a term of ninety-nine years from the death of the said Sir J. J. Smith upon

1899

ATTORNEY-GENERAL v. SMITH-MARRIOTT.

trusts for further securing the payment of the said jointure rent-charge.

Sir J. J. Smith died on September 3, 1862.

In the year 1870 the hereditaments in the county of Lincoln charged with the said jointure rent-charge were sold and conveyed by the defendant, Sir W. H. Smith-Marriott, the successor in title of the said Sir J. J. Smith, partly to J. B. Stanhope and partly to S. Grant, the respective purchasers thereof, but subject to the said jointure rent-charge; and as an indemnity to the purchasers of the said hereditaments against the said jointure rent-charge, part of the purchase money was invested in the purchase of a sum of 13,333*l.* 6*s.* 8*d.* Reduced 3 per cent. Bank Annuities in the names of trustees upon trusts for indemnifying the said purchasers against the said jointure rent-charge, and subject thereto upon trusts under which the defendant was or became absolutely entitled to the said bank annuities.

In addition to the Lincolnshire estates, the defendant, as successor in title to the said Sir J. J. Smith, became entitled to certain Dorsetshire estates, and by an indenture of settlement dated December 21, 1868, and made on the marriage of the defendant, the said hereditaments in the county of Dorset were limited to the use of the defendant and his assigns during his life without impeachment of waste with divers remainders over.

In the year 1883 the defendant came to an arrangement with the said Dame Frances Smith for transferring the security for her jointure rent-charge from the Lincolnshire property to the Dorsetshire property. This arrangement was carried into effect by three indentures dated December 31, 1883. By two of these indentures, after reciting that the defendant had secured the said jointure rent-charge to the said Dame Frances Smith to her satisfaction, and that she had in consequence agreed to release the said hereditaments, the said Dame Frances Smith, at the request of the defendant and in consideration of the defendant having secured the said jointure rent-charge to the said Dame Frances Smith as thereinbefore mentioned, released to the said J. B. Stanhope and S. Grant respectively

the hereditaments sold and conveyed to them in 1870 as before mentioned from the said jointure rent-charge, and by the same indentures the term of years for securing the said jointure rent-charge was also released. By the third indenture dated December 31, 1883, after reciting that the defendant, being desirous of having the 13,333*l.* 6*s.* 8*d.* Reduced 3 per cent. Bank Annuities to which he was entitled, subject to the aforesaid trusts for indemnity, transferred to him, had proposed to the said Dame Frances Smith that she should release the said hereditaments in the county of Lincoln so sold as aforesaid, subject to her said jointure rent-charge, and that thereupon the said bank annuities should be transferred to the defendant, and that in consideration thereof the defendant should charge his life estate in the said hereditaments in the county of Dorset under the said indenture of December 21, 1868, and also, in case he should die in the lifetime of the said Dame Frances Smith, certain policies of assurance on his life to which he was entitled, with the payment to the said Dame Frances Smith during her life of an annual sum of 400*l.* in lieu of the said jointure rent-charge so to be released; and that the said Dame Frances Smith agreed to the said proposal, and had accordingly released the hereditaments in the county of Lincoln so sold as aforesaid from the said jointure rent-charge; and that it was intended that the said bank annuities should be forthwith transferred to the defendant; it was witnessed that, in pursuance of the said agreement and for the considerations thereinbefore appearing, the defendant as beneficial owner thereby charged all his life estate and interest under the said indenture of December 21, 1868, in the hereditaments in the county of Dorset thereby settled, and in any other hereditaments, and in any moneys, stocks, funds, or securities which might during the joint lives of the defendant and the said Dame Frances Smith become subject to the uses or trusts of the said indenture; and, secondly, in case the defendant should die in the lifetime of the said Dame Frances Smith, certain policies of assurance on the life of the defendant (the particulars whereof were specified in the schedule thereto) with the payment to the said Dame Frances Smith and her assigns during

1899

ATTORNEY-GENERAL v. SMITH-MARRIOTT.

her life of the annual sum of 400*l.*, to be payable by equal quarterly payments, tax free and without any deduction, the first of such quarterly payments to be made on such one of the quarterly days on which the said jointure rent-charge on the said estates in the county of Lincoln would have been payable, if the same had continued to be payable, as should next happen, and also with the payment to the said Dame Frances Smith or her assigns of all such sums of money as she or they might advance or pay in or towards keeping on foot the policies of assurance thereby charged, or any policy or policies substituted for the same, with interest as therein mentioned. And it was declared that the said Dame Frances Smith should, during the joint lives of herself and the defendant, have and be entitled to exercise all remedies and powers given to a person entitled to receive an annual sum out of the income of land by s. 44 of the Conveyancing Act, 1881, in respect of the said annual sum of 400*l.* thereby charged. And it was provided that the charge thereby created should affect and attach upon the life estate or interest of the defendant in all property which by means of any sale, exchange, or transposition of investment might from time to time be substituted for the said hereditaments or any part thereof. This last indenture was the security referred to in the other two indentures of December 31, 1883, as having been given to the satisfaction of the said Dame Frances Smith for the said jointure rent-charge.

On June 1, 1895, the said Dame Frances Smith died. The defendant is still living. The Attorney-General charged that under the circumstances estate duty under the provisions of the Finance Act, 1894, became payable on the death of Dame Frances Smith in respect of the benefit accruing or arising to the defendant as tenant for life of the Dorsetshire estates by the cesser of the annuity of 400*l.* per annum. The defendant refused to pay such duty, contending that no duty was payable on the ground that the annuity was granted for full consideration in money's worth within the meaning of s. 3, sub-s. 1, of the Finance Act, 1894.

By s. 3, sub-s. 1, of the Finance Act, 1894, "Estate duty shall not be payable . . . . in respect of the determination of

any annuity for lives where . . . . such annuity . . . . was granted for full consideration in money or money's worth paid to the . . . . grantor for his own use or benefit."

The Solicitor-General (*Sir R. B. Finlay, Q.C.*), (*Vaughan Hawkins* with him), for the Crown. Estate duty was payable on the death of Dame Frances Smith. This was not an annuity granted for full consideration in money or money's worth within the meaning of s. 3 of the Finance Act, 1894. By the indentures of December 31, 1883, the security for the payment of the annuity was merely shifted from the Lincolnshire to the Dorsetshire estates, but the annuity remained the same. It is not disputed that estate duty would have been payable if the annuity had remained charged on the Lincolnshire estates, and the fact that the charge has been transferred from the Lincolnshire to the Dorsetshire estates can make no difference.

A. T. Lawrence, Q.C., and *Danckwerts*, for the defendant. Estate duty was not payable in respect of this annuity. The jointure rent-charge on the Lincolnshire estates was extinguished by the deeds of December 31, 1883. The defendant, instead of paying a lump sum for the extinguishment of Dame Frances Smith's claim, agreed to pay her an annuity charged on his life interest in the Dorsetshire property. That, therefore, was an annuity granted for money's worth, the consideration being the extinguishment of the jointure rent-charge. Taxing Acts must be construed strictly, and this falls within the precise wording of s. 3 of the Finance Act, 1894.

[They cited *Wale* v. *Commissioners of Inland Revenue* (1); *Tennant* v. *Smith* (2); *Commissioners of Taxation* v. *Teece* (3); *Phillips* v. *Morrison*. (4)]

The Solicitor-General replied.

DARLING J. I think in this case our judgment must be for the Crown.

The facts sufficiently appear from the information and answer, and I do not think it is necessary to recapitulate them

(1) (1879) 4 Ex. D. 270.
(2) [1892] A. C. 150.
(3) [1899] A. C. 254.
(4) (1844) 13 L. J. (Ex.) 212.

1899

ATTORNEY-GENERAL v. SMITH-MARRIOTT.

Darling J.

further than to say that the effect of them is this: that Sir William Smith-Marriott had property in Lincolnshire and in Dorsetshire, and one of the consequences of his having that property was that he had to pay to Lady Smith 400*l.* a year. He was, from the time he got the property down to Lady Smith's death, liable in one way or another to a payment to her of an annuity of 400*l.* a year. It is true that he was not liable in the same way, nor did the annuity issue out of the same property or funds during the whole of that time; it was not secured in the same way during the whole of that time, because in December, 1883, an arrangement was made, the effect of which, to my mind, was that as a matter of fact Sir William Smith-Marriott still remained burdened with the same obligation to Lady Smith. He owed her the same amount every year. It was not secured any longer upon his Lincolnshire property; it was not secured only upon real property at all after the deeds of December, 1883. It became secured upon the Dorsetshire property and upon his life; but the burden upon him as an individual was precisely the same as regarded Lady Smith.

It appears that the effect of these deeds is that an arrangement was come to by which Lady Smith took from him a different security for her jointure. It was a security as burdensome to Sir William Smith-Marriott as the security which Lady Smith gave up; it weighed just as heavily upon him, although it is quite true that the immediate weight of it was upon a different portion of his property.

Sir William Smith-Marriott in these circumstances says that upon Lady Smith's death he is not liable to pay estate duty because he comes within the exception in s. 3 of the Finance Act, 1894, which says that he should not pay estate duty "in respect of the determination of an annuity" "where such annuity was granted for full consideration in money or money's worth paid to the grantor for his own use or benefit."

Now, I have to ask, Is there anything which was paid to Sir William Smith-Marriott here for his own use or benefit; and, if there is, was it for full consideration in money or money's worth? I am unable to see anything which I think

fairly comes within those words. The arrangement by which this annuity was charged upon the Dorsetshire property is said to amount to the creation of a new annuity. I do not think it was. I think it was a mere transfer of the burden of the jointure which was always upon Sir William Smith-Marriott from one portion of his property to another. It does not seem to me that the annuity, which was created (if it be treated as a new creation) by the deed of December, 1883, was an annuity created for full consideration in money or money's worth paid to Sir William Smith-Marriott in any shape or form. It appears to me to have been a mere rearrangement by which an annuity, which had always been payable by him, was secured to the person entitled to that annuity in a different way. That was, or may have been, less inconvenient to Sir William Smith-Marriott, or I suppose he would not have made the arrangement; but I cannot see that for that reason it can be held to have been created "for full consideration in money or money's worth" paid to him.

It has been contended that we must construe Acts of this kind in some peculiar way—that the case must come within the very words of the Act of Parliament. I agree that neither the Crown nor anybody else is entitled to demand against any one, by virtue of an Act of Parliament, anything which is not granted by the words of that Act of Parliament. But I do not think that if by putting the narrowest possible construction upon the words of an Act of Parliament they can be made to cover a particular case, that meaning and no other must be given to the Act of Parliament. Taking the strongest expression which has been cited, an expression used in the judgment of the Court of Exchequer in *Phillips* v. *Morrison* (1), "The party who seeks to bring an instrument within the Stamp Act must shew clearly that it falls within it,"—I think, here, that the Crown has shewn clearly that this case falls within the words of the Finance Act, 1894. Then that judgment goes on to say, "he must, so to speak, hit the bird in the very eye." It is contended that that remark means that we must put a very narrow construction upon these taxing Acts, and

(1) 13 L. J. (Ex.) 212.

1899

ATTORNEY-GENERAL v. SMITH-MARRIOTT.

Darling J.

that we are not to look at this Act of Parliament as we should at any other. I can only say that it appears to me that to read these words in that way shews again the danger in law courts of using picturesque language, and that that expression—borrowed no doubt from the pastime of the popinjay—does not make me feel bound to give to the words of this Act of Parliament a meaning which I do not think they naturally bear.

PHILLIMORE J. I agree that our judgment should be for the Crown.

The case is brought clearly under the words of s. 2 of the Act, and the burden is upon the defendant to bring the case within the excepting words of s. 3, sub-s. 1. The whole matter really turns upon one short question—Is this a new annuity, or an old one with a varied security? The strength of the argument for the defendant (and I am not at all saying there is not some force in it) lies in this—that in law a freehold annuity upon estate A. is a different thing from a freehold annuity on estate B. To put the matter quite plainly, if this annuity had lain in covenant, if there had been a bond by Sir William Smith-Marriott to secure 400*l.* a year with a charge upon his Lincolnshire estates as the security, and the effect of the new arrangement had been to leave that bond untouched, but to substitute as the security a charge upon his Dorsetshire estates, I should have said that the argument of the defendant absolutely failed. The only thing the defendant has to say for himself is that this is not such an annuity as is alleged. It is a grant of a freehold interest in one estate substituted for a grant of a freehold interest in another estate. No doubt it is different to that extent. Lady Smith ceases to be a freeholder in the county of Lincoln and becomes, I take it, a freeholder in the county of Dorset. There are differences between the two annuities; but at the same time the true substance of the matter is that which the deeds express. It is the substitution of a security. The annuity, although in reality it does not exist apart from the estate out of which it is carved, is treated by the parties as an entity of itself; and that after

1899

ATTORNEY-GENERAL v. SMITH-MARRIOTT.

Phillimore J.

all is the business view of the matter; and therefore, in my opinion, Sir William Smith-Marriott (who would certainly have had to pay the estate duty if he had not sold his Lincolnshire estates) is still liable to pay the duty on the death of Lady Smith. This annuity is not to escape from paying because he has substituted, by arrangement with her, his Dorsetshire estates in place of his Lincolnshire estates.

Judgment for the Crown.

Solicitor for informant: *Solicitor of Inland Revenue.*

Solicitors for defendant: *Lee, Ockerby & Everington, for Hinds & Sons, Goudhurst.*

A. P. P. K.

MONCKTON *v.* PAYNE.

1899
Aug. 5.

Copyhold—Fine on Admittance—Limitation of Action—Point from which Time begins to Run—3 & 4 Will. 4, c. 42, s. 3.

The lord of a manor was entitled to an arbitrary fine on the admittance of a tenant to copyhold. He brought an action for the fine more than six years after the admittance, but less than six years from the assessment and demand of the fine:—

Held, that the period of limitation began to run from the time of the admittance, and that the lord's right was therefore barred by 3 & 4 Will. 4, c. 42, s. 3.

ACTION tried by A. L. Smith L.J. without a jury.

The plaintiff was the lord of the manor of Duddington.

The defendant was the widow of a copyhold tenant of the manor, who died in 1886 devising the copyhold premises to his widow. On April 5, 1892, the defendant was admitted tenant of the manor. By the custom of the manor she had to pay to the lord an arbitrary fine on admittance, which was to be fixed by the lord at not more than two years' annual value of the copyhold.

In February, 1898, the lord assessed this fine at the sum of 24*l.*, which was admitted to be a reasonable amount; and on September 2, 1898, a demand for this amount was made on the defendant. The fine not having been paid, the present action was brought, the writ being issued on April 13, 1899.

1899

MONCKTON v. PAYNE.

The defence set up was that the action was out of time, and the defendant relied on the provisions of 3 & 4 Will. 4, c. 42, s. 3. (1)

Bray, Q.C. (*Clavell Salter* with him), for the plaintiff. The period of limitation does not begin to run until assessment and demand of the fine by the lord of the manor. In Scriven on Copyholds, 7th ed. p. 200, the law is thus stated: "The fine on admission is recoverable by the lord or his executors in an action . . . . and such action must be brought within six years after the cause of action accrues—that is to say, after the admittance, the assessment, and the demand." A fine not certain cannot be recovered unless and until it be assessed and demanded: *Hayward* v. *Raw*. (2) Martin B. there said (3): "The right of a lord to a fine arises upon assessment." The period of limitation only begins to run from the time the plaintiff first had a complete cause of action against the defendant: *Miller* v. *Dell*. (4) The plaintiff's cause of action was not complete until assessment and demand.

J. B. Matthews, for the defendant. The words in Scriven on Copyholds, 7th ed. p. 200, "that is to say, after the admittance, the assessment, and the demand," rest upon no authority and are not to be found in the earlier editions of the book. The cause of action accrues on admittance: *Hobart* v. *Hammond*. (5) Popham C.J. there says: "The admittance is

(1) By 3 & 4 Will. 4, c. 42, s. 3, "And be it further enacted that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates . . . . that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation hereinafter expressed and not after—that is to say, the said actions of debt for rent upon an indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt or scire facias upon recognizance within ten years after the end of this present session or within twenty years after the cause of such actions or suits, but not after . . . . and the said other actions within three years after the end of the present session or within six years after the cause of such actions or suits, but not after. . . ."

(2) (1861) 6 H. & N. 308.

(3) 6 H. & N. at p. 327.

(4) [1891] 1 Q. B. 468.

(5) (1600) Co. Rep. pt. iv. 27 b.

the cause of the fine." No doubt it is essential to the success of the lord that there should have been assessment and demand; but as those proceedings were in his power, the period of limitation began to run from the admittance. The cause of action is not necessarily what the plaintiff must prove in order to succeed: *In re Bethell* (1); *Coburn* v. *Colledge*. (2) [He also cited *Whitfield* v. *Hunt* (3); *Grant* v. *Astle*. (4)]

Clavell Salter replied.

A. L. SMITH L.J. This is an action brought by the lord of the manor of Duddington against a lady named Payne to recover the sum of 24*l*. as the fine payable by her on her admission to the copyhold of her late husband. The defence set up is that the claim of the lord of the manor is barred by 3 & 4 Will. 4, c. 42, s. 3, and the question which I have to decide is whether the defendant comes within the protection of that statute.

The defendant was admitted tenant of the copyholds in question on April 5, 1892. It is conceded that the sum of 24*l*. which is now claimed is a proper fine to claim under the circumstances for such admittance; but the lord of the manor took no steps to assess the fine until February, 1898, and did not make a demand for it until September, 1898. Then, on April 13, 1899, the writ in this action is issued. That is to say, seven years have elapsed between the admittance and the issue of the writ; and if the cause of action accrued on admittance, it is plain that the action would be barred by s. 3 of the statute, which was undoubtedly passed in favour of the copyhold tenant, and to prevent old claims being vexatiously set up against him. The material words of the section are these: "Be it further enacted that all actions of debt . . . . for any fine due in respect of any copyhold estate . . . . that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued . . . . within six years after the cause of such actions or suits, but not after."

(1) (1887) 34 Ch. D. 561.
(2) [1897] 1 Q. B. 702.
(3) (1784) 2 Doug. 727 b.
(4) (1781) 2 Doug. 722.

1899

MONCKTON v. PAYNE.

A. L. Smith L.J.

It is clear that this action was brought more than six years after the admittance; but the plaintiff contends that the admittance alone was not the cause of action, but that the cause of action was not complete until assessment and demand. That is to say, that the plaintiff has power to postpone the operation of the statute as long as he chooses, and that the period of limitation is not to begin to run in the tenant's favour until the lord has thought fit to make the assessment and demand, which he might postpone at his will for any length of time. I should require very strong authority before I could hold that. No doubt it is true that the lord could not sue with any success until the fine had been assessed and demanded; but it is equally true that the very day on which the admittance takes place it is competent to the lord to complete the cause of action by assessing and demanding the fine. If he does not choose to complete his cause of action in this way when it is within his power to do so, that is entirely his own fault. I do not see how his conduct can prevent the operation of the statute, which, as it seems to me, was passed for the very purpose of preventing the tenant from being harassed by actions of such a kind long after the admittance. In my opinion, therefore, in such a case as the present the cause of action is the admittance, and the statute at once begins to operate. The lord, if he wishes to defeat its operation, has only to complete his cause of action by assessment and demand of the fine, and it is in his power alone to do this.

I do not say anything as to the cases which have been cited on old points of pleading, because they do not appear to assist me. I give judgment for the defendant with costs.

Judgment for defendant.

Solicitors for plaintiff: *Peacock & Goddard, for Phillips, Evans & Co., Stamford.*

Solicitors for defendant: *Smiles & Co., for Welchman, Carrick & Jackson, Wisbech.*

A. P. P. K.

Ex parte FLINN & SONS (No. 2).

1899
Aug. 8.

Licensing Acts—Offences—Sale without Licence—Disqualification from holding Licence—Application by Owner for Authority to carry on Business—Beerhouse licensed before 1869—*Limitation of Discretion of Justices to refuse Application—Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19; *Licensing Acts*, 1872, 1874 (35 & 36 *Vict. c.* 94, *s.* 3; 37 & 38 *Vict. c.* 49, *s.* 15).

The holder of a licence to sell beer to be consumed on and off the premises, which had been continuously in force from a date anterior to 1869, having forfeited this licence in consequence of his conviction for selling spirits without a licence, the owner of the premises applied to a court of summary jurisdiction, under s. 15 of the Licensing Act, 1874, for authority to carry on the same business on the same premises until the next special licensing sessions:—

Held, that the court of summary jurisdiction had no authority to refuse this application on any ground other than those specified in s. 8 of the Wine and Beerhouse Act, 1869.

SPECIAL CASE stated by justices under the Summary Jurisdiction Acts.

Prior and up to the date of the conviction hereinafter mentioned, one Walter Peachey, of the Royal Oak Beerhouse, in the borough of Saffron Walden, was the holder of a licence to sell beer to be consumed on and off the said premises, with respect to which premises such a licence had been in force continuously from a date anterior to 1869 until the forfeiture hereinafter mentioned.

On February 18, 1899, the said Walter Peachey was for the second time convicted of selling spirits without a licence, and thereupon, by the operation of s. 3 of the Licensing Act, 1872, the said Walter Peachey forfeited his licence to sell beer.

At a court of summary jurisdiction holden for the said borough on February 25, 1899, application was made on behalf of Messrs. Flinn & Sons, the owners of the Royal Oak Beerhouse, for an authority under s. 15 of the Licensing Act, 1874 (1),

(1) By the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 15, "Where any licensed person is convicted" of certain specified offences, "and in consequence either becomes personally disqualified or has his licence forfeited,

1899

FLINN & SONS (No. 2), *Ex parte.*

to carry on until the next special sessions for licensing purposes the business of beer-sellers, being the same business as had previously to his conviction as aforesaid been carried on by the said Walter Peachey at the said Royal Oak Beerhouse; but the justices, finding as a fact that prior to such application being made the said Walter Peachey had been convicted for the second time of the offence of selling spirits without a spirit licence, held that they had no jurisdiction to hear and determine the application under the said section, inasmuch as the opening words of that section limit the right to make such application to cases where a person is convicted for the first time, and that any application for a licence for the said premises could only be entertained at the general annual licensing meeting for the said borough.

Upon a special case stated for the opinion of the High Court, such Court on June 8, 1899, decided that the justices had jurisdiction, and remitted the matter to them to hear and determine the said application (see *Ex parte Flinn & Sons* (1)); and accordingly, on June 17, 1899, the same was heard by the court of summary jurisdiction upon the merits. The applicants contended that, as the retail beer licence in question was in force on May 1, 1869, the discretion of the justices to refuse the application was restricted to the four grounds of objection specified in s. 8 of the Wine and Beerhouse Act, 1869, notwithstanding the forfeiture, and, further, that for the purposes of s. 15 of the Licensing Act, 1874, the licence was not dead.

The justices held, on the authority of *Reg.* v. *Herts Justices* (2) and *Freer* v. *Murray* (3), that in order to bring the case within

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there may be made by or on behalf of the owner of the premises an application to a court of summary jurisdiction for authority to carry on the same business on the same premises until the next special sessions for licensing purposes, and a further application to such next special sessions for the grant of a licence in respect of such premises, and for this purpose the provisions contained in the Intoxicating Liquor Licensing Act, 1828, with respect to the grant of a temporary authority and to the grant of licences at special sessions, shall apply as if the person convicted had been rendered incapable of keeping an inn, and the person applying for such grant was his assignee."

(1) Ante, p. 154.

(2) (1881) 50 L. J. (M.C.) 121; S. C. sub nom. *Reg.* v. *Moore*, 7 Q. B. D. 542.

(3) [1894] A. C. 576.

s. 8 of the Wine and Beerhouse Act, 1869, the licence must not only have been in force on May 1, 1869, but also must have been continuously in force down to and at the date of the application, and that, as the licence in question had by the forfeiture ceased to exist prior to the application, the discretion of the justices was not limited to the four grounds, and they therefore refused the application on a ground other than the four specified in s. 8 of the Wine and Beerhouse Act, 1869, and stated this case for the opinion of the Court.

Foote, Q.C. (*H. O. S. Ellis* with him), for the appellants. The question is whether, in the case of licensed premises of which the licence was in force on May 1, 1869, and of which the licence has been renewed from time to time, the court of summary jurisdiction to whom an application is made by the owner of the premises for a provisional licence under s. 15 of the Licensing Act, 1874, are limited to the four grounds of objection specified in s. 8 of the Wine and Beerhouse Act, 1869, or whether they can go outside those grounds and refuse the application for other reasons. The contention of the justices is that they have absolute discretion to grant or refuse the application, and they accordingly refused it on the ground that the licence had ceased to exist. But although the licence had been forfeited by the misconduct of the holder, it had not ceased to exist in the eye of the law, since s. 15 expressly provides that it is to be treated as if the person convicted had been rendered incapable by sickness or death of keeping an inn, and the person applying for the temporary authority was his assignee, and the provisions of s. 14 of the Licensing Act of 1828 are made to apply. The appellants, therefore, were right in applying for the temporary authority, and, that being so, the justices could only by s. 19 of the Act of 1869 have refused their application on one of the four grounds specified in s. 8 of that Act. It has been decided that justices at special sessions can only refuse the transfer of such a licence on one or more of the four specified grounds : *Simonds* v. *Blackheath Justices* (1) ; and it has been further decided that the justices at special sessions may refuse an application under s. 15 for the grant of a licence

(1) (1886) 17 Q. B. D. 765.

1899

FLINN & SONS (No. 2), *Ex parte.*

in respect of such premises on any of those four grounds: *Reg.* v. *Herts Justices.* (1) But that case does not go so far as to say that an application under s. 15 in such a case may be refused on any other than the four grounds. In *Freer* v. *Murray* (2), on which the court of summary jurisdiction also relied, the facts were different: the licence had expired, the tenant's application for a renewal having been wrongly refused. He did not, however, appeal, and the licence therefore expired: see per Lord Watson. (3) The House of Lords decided that the protection given by s. 19 of the Wine and Beerhouse Act, 1869, only applied where the licence had a continuous existence from a date prior to May 1, 1869, down to the date of the application for a transfer. In the present case the licence although forfeited has not expired, as is plain from the provisions of s. 15.

It may be that the owner is entitled to this provisional licence as of right, and that the court of summary jurisdiction has no jurisdiction to refuse his application at all; but it is unnecessary to place his contention so high. The court of summary jurisdiction have refused his application on a ground other than the four specified ones, and it is, therefore, sufficient to say that they have exceeded their jurisdiction in so doing.

DARLING J. In this case it is unnecessary for me to state the facts, which are fully set out in the special case. An application was made by the owner of licensed premises, which had been licensed ever since a period prior to the Act of 1869, and the licence to which had become forfeited by the misconduct of the licensed person, to a court of summary jurisdiction under s. 15 of the Licensing Act, 1874, for authority to carry on the same business on the same premises until the next special sessions for licensing purposes. The justices were of opinion that their discretion to grant or refuse the application was absolute, and that they were not limited to the four grounds of objection prescribed by ss. 8 and 19 of the Wine and Beerhouse Act, 1869. They, therefore, heard evidence which was tendered,

(1) 50 L. J. (M.C.) 121; S. C. sub nom. *Reg.* v. *Moore*, 7 Q. B. D. 542.

(2) [1894] A. C. 576.

(3) [1894] A. C. at p. 585.

and ultimately refused the application on a ground which was not one of those four grounds. The question that we have to decide is whether they were right. I think that they were wrong. It is not necessary now to decide whether the temporary authority to carry on the premises can be claimed under s. 15 from the court of summary jurisdiction as a matter of right; but, whatever may be said as to that, it seems to me plain that in such a case as the present the only jurisdiction the magistrates had was to inquire whether the application could be refused on one of the four specified grounds. They did not affect to refuse the application on any of those grounds, but, considering that they had an absolute discretion, they refused it on another ground altogether. In that, I think, they were wrong, and their decision must, therefore, be reversed.

PHILLIMORE J. I am of the same opinion. It is unfortunate that the case can only be argued on one side; but the justices have stated the case very fairly, and have shewn us clearly what their reasons were for deciding as they did. The holder of licensed premises had forfeited his licence, and the owner applied under s. 15 of the Act of 1874 for an authority to carry on the business. The justices at first thought that on technical grounds they had no power to entertain the application, but as to that they were set right by the Divisional Court: see *Ex parte Flinn & Sons.* (1) The owner then renewed his application, and the magistrates refused it on a ground other than those specified in s. 8 of the Act of 1869. No doubt there is some awkwardness in saying that a licence has been forfeited and yet that it can be assigned or carried on; but the awkwardness is, I think, only verbal, and when s. 15 comes to be looked at as a whole it appears that the licence is to be regarded as only forfeited in respect to the licensee, but as capable of being kept alive in favour of the owner. That seems to me to be a reasonable way of construing the section. In substance the application of the owner must be regarded as if it were an application for a transfer. If that is so, *Simonds* v. *Blackheath Justices* (2) is an authority for saying that on the application

(1) Ante, p. 154. (2) 17 Q. B. D. 765.

1899

FLINN & SONS (No. 2), *Ex parte.*

Phillimore J.

for the transfer of such a licence as the one now in question the justices are limited to the four grounds. Then *Reg.* v. *Herts Justices* (1) decides that the magistrates at special sessions may refuse the transfer on any of those four grounds. The matter is, therefore, reduced to a very small compass. The justices at special sessions are limited to the four grounds in refusing the transfer of such a licence, but they may refuse it on any of those four grounds. I do not wish to go outside the present case, but I am strongly of opinion that the court of summary jurisdiction would be entitled to refuse the owner's application for temporary authority to carry on such a licence as this on any of those four grounds. That, however, it is not necessary to decide now. I am clear that they had no authority to refuse the application on any ground other than those four, and that is what they have done here. The appeal must, therefore, succeed, and the owner will be entitled to carry on the business until the next special sessions for licensing purposes. It will then be open to that sessions to refuse the further application contemplated by s. 15 on any of the four grounds.

Appeal allowed.

Solicitors for appellant: *Thorneycroft & Willis, for Baker & Thorneycroft, Bishop's Stortford.*

(1) 50 L. J. (M.C.) 121.

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1899
Aug. 10.

THE MERCANTILE BANK OF LONDON, LIMITED *v.* EVANS.

Assignment of Debt—Security—Power to Assignee to Sue in name of Assignor—Absolute Assignment—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

The plaintiffs made an advance to a customer who, in consideration thereof, assigned to them the whole of his rights and interest under an agreement between himself and others, of whom the defendant was one, as security for the repayment on demand of the advance, and by the assignment he appointed the plaintiffs his nominees in pursuance of the provisions of the agreement, with power to exercise all his rights thereunder either in his name or in the plaintiffs' own name, and he appointed them his attorneys in that behalf. In an action to recover from the defendant moneys alleged to be due under the agreement:—

Held, that the assignment was not an absolute assignment within the meaning of s. 25, sub-s. 6, of the Judicature Act, 1873.

Tancred v. *Delagoa Bay Ry. Co.*, (1889) 23 Q. B. D. 239, and *Comfort* v. *Betts*, [1891] 1 Q. B. 737, distinguished.

APPEAL from a judgment of Bruce J. at the trial of the action without a jury.

C. G. Vansittart had acquired an option to purchase a business with a view to selling it to a company to be formed for the purpose of carrying it on. On June 1, 1897, he entered into an agreement with a number of persons, of whom the defendant was one, whereby a fund was to be established to meet the promotion expenses of the company. Each subscriber to the agreement agreed to be responsible for the amount set opposite to his name in the schedule, and agreed to pay the same, or such part thereof as he might be required to contribute, to Vansittart or his nominees or assigns, within fourteen days after being called upon to do so. The amount set opposite to the defendant's name in the schedule was 100*l.*

Vansittart procured from the plaintiffs a credit of 200*l.*, as security for which, on June 3, 1897, he executed the following assignment: "In consideration of your placing to my credit

C. A. 1899

MERCANTILE BANK OF LONDON v. EVANS.

to-day the sum of 200*l.*, I hereby assign to you the whole of my rights and interest under the agreement dated 1st June, 1897 . . . . as security for the repayment on demand of the said sum of 200*l.* and any further sum or sums that you may from time to time hereafter advance to me either directly or by way of overdraft or otherwise howsoever, and I hereby appoint you my nominees in pursuance of the provisions of the said agreement, with power to exercise all my rights thereunder, either in my name or your own; and I hereby appoint you my irrevocable attorneys in that behalf."

The plaintiffs informed the defendant by letter that they had made advances to Vansittart on the security of the agreement of June 1, 1897, and that the advances were still outstanding. Subsequently the plaintiffs gave the defendant fourteen days' notice to pay to them the sum of 100*l.*, and as he did not pay they brought this action to recover that amount. They claimed the 100*l.* as assignees or nominees of Vansittart, and alleged that notice of the assignment of June 3, 1897, had been given to the defendant in conformity with the provisions of s. 25, sub-s. 6, of the Judicature Act, 1873.

At the trial the question raised before the learned judge was whether anything was due from the defendant under the deed of June 1, 1897, and he found on this point in favour of the plaintiffs, and gave judgment for them.

The defendant appealed.

July 20. *Montague Lush*, and *M. Abrahams*, for the defendant. The terms of the agreement of June 3, 1897, are inconsistent with its being an absolute assignment, so that it does not come within s. 25, sub-s. 6, of the Judicature Act, 1873. The plaintiffs are appointed attorneys to sue in the name of Vansittart, whereas if the assignment were absolute they would have to sue in their own names. The assignment purports to be by way of security, and if the money secured were repaid by the assignor the deed would have no further effect, and no reconveyance to the assignor would be required.

[They cited *Durham Brothers* v. *Robertson*. (1) They also

(1) [1898] 1 Q. B. 765.

argued that no debt was due from the defendant to the assignor.]

Rufus Isaacs, *Q.C.*, and *F. Dodd*, for the plaintiffs. The fact that an assignment is a security is not inconsistent with its being absolute, as, for instance, the case of a mortgage: *Tancred* v. *Delagoa Bay Ry. Co.* (1) An absolute assignment may be subject to an equity of redemption: *Comfort* v. *Betts* (2); *Wiesener* v. *Rackow*. (3) The clause giving the plaintiffs a power of attorney is an alternative clause, so that they had the choice of proceeding under it or giving notice.

[They argued also that the judgment should stand on the point as to there being a debt.]

Montague Lush, in reply.

Cur. adv. vult.

1899. Aug. 10. A. L. SMITH L.J. read the following judgment:—This is an action brought by the plaintiffs to recover from the defendant the sum of 100*l.*, being the amount contracted to be paid by the defendant to one C. G. Vansittart under an agreement dated June 1, 1897, and the plaintiffs sue the defendant as assignees of this agreement from Vansittart. The first point which arises, though it was not taken in the Court below, is—whether the assignment from Vansittart to the plaintiffs is "an absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action" within s. 25, sub-s. 6, of the Judicature Act, 1873, for if it be not there can be no doubt that the plaintiffs cannot maintain this action. The main point taken in the Court below was that there was no debt, or any liability to pay Vansittart on the part of the defendant under the agreement of June 1, 1897, and therefore no debt or legal chose in action within s. 25.

This point my brother Bruce decided in favour of the plaintiffs; but the point as above mentioned, as to the assignment being absolute or not, has to be dealt with, for it stands out upon the face of the document itself.

(1) 23 Q. B. D. 239. (2) [1891] 1 Q. B. 737.
(3) (1897) 76 L. T. 448.

C. A.
1899

MERCANTILE BANK OF LONDON v. EVANS.

A. L. Smith L.J.

The assignment which is dated June 3, 1897, is as follows: "In consideration of your (plaintiffs) placing to my (Vansittart's) credit to-day the sum of 200*l.*, I (Vansittart) hereby assign to you the whole of my rights and interest under the agreement dated 1st June, 1897 . . . . as security for the repayment on demand of the said sum of 200*l.* . . . . and I hereby appoint you my nominees in pursuance of the provisions of the said agreement, with power to exercise all my rights thereunder either in my name or your own, and I hereby appoint you my irrevocable attorneys in that behalf." This seems to me to shew that the right of suing on the contract remained in the assignor.

The "rights and interest" under the agreement of June 1, 1897, which Vansittart had, was the obligation of the defendant and twelve other persons to pay to him in certain events 100*l.* each towards the promotion expenses of a company to be called Henry White & Co., Limited. The question is, Has Vansittart, by the document of June 3, 1897, absolutely assigned his rights and interest under the agreement of June 1, 1897, to the plaintiffs?

That he has assigned his rights for the purpose of securing the repayment to the plaintiffs of the 200*l.* is true; but has he absolutely assigned to the plaintiffs his rights and interest under the agreement? Assume that the 200*l.* had been paid off to the plaintiffs, what would then be their position as to the agreement of June 1, 1897? Would they, when this event had happened, have had any further right or interest in the contract? If the plaintiffs' contention be right, the answer must be Yes; but it appears to me that they would have no further rights at all, for it was only for securing to them the repayment of the 200*l.* that the rights and interest of Vansittart under the agreement of June 1, 1897, were assigned to the plaintiffs, and neither in form nor in substance was there an absolute assignment by Vansittart of his rights and interest under the contract, no matter whether the 200*l.* had been repaid or not.

This is not like the case of *Comfort* v. *Betts* (1), where the

(1) [1891] 1 Q. B. 737.

assignment was in terms absolute, and in which case the Court held that the assignment being absolute in terms it was not cut down by reason of there being a trust in respect of the proceeds of the debt assigned, in certain events, in favour of the assignor; nor is it the case of a mortgage, which was held by the Queen's Bench Division in *Tancred* v. *Delagoa Bay Ry. Co.* (1) to be an absolute assignment, though subject to an equity of redemption. The present is not a mortgage, for there was no absolute assignment of the benefit of the contract at all, but merely an assignment sufficient to secure the repayment of the 200*l.*—that is, an assignment pro tanto, which is not an absolute assignment of the benefit of the whole contract as contended for by the plaintiffs. For these reasons I think that the defendant is entitled to judgment, and that this appeal must be allowed.

The Lord Chancellor agrees in the result of this judgment.

VAUGHAN WILLIAMS L.J. read the following judgment:—I agree. I should require further consideration before I could affirm that every instrument of mortgage expressed as an absolute assignment would necessarily fall outside sub-s. 6 of s. 25 of the Judicature Act, 1873, as purporting to be by way of charge only, merely because it appeared on the face of the instrument that the absolute assignment was for the purpose only of securing the debt. It may be that such an assignment is an absolute assignment so long as the debt is unpaid; but in the present case I do not think there is an absolute assignment not purporting to be by way of charge only. The assignment is expressed to be of the whole of the assignor's rights and interest under the agreement dated June 1, 1897. It does not purport to be an absolute assignment of the contract. It is plain that the defendant and his co-signatories would have a right, notwithstanding the assignment, to have the accounts taken between them and the assignor. If those accounts are taken, it seems probable that as between them and the assignor there will appear to be no debt. This is not the case where a debt has accrued under a contract, and there has been an

(1) 23 Q. B. D. 239.

C. A. 1899

MERCANTILE BANK OF LONDON v. EVANS.

Vaughan Williams L.J.

assignment of that debt. It seems to me to be an attempt to cut an entire contract into two parts, and to assign a part of that contract.

This seems to have been the view of the parties themselves, who introduce into the so-called assignment an irrevocable power of attorney to the assignee to sue in the assignor's name.

I agree, therefore, with the conclusion that the plaintiff bank cannot recover in this case.

In my point of view, it is not necessary to decide in this case whether an instrument of mortgage purporting on its face to be for the security of a debt might not fall within sub-s. 6 of s. 25.

Appeal allowed.

Solicitors for plaintiffs: *Templer Down & Miller.*
Solicitor for defendant: *J. Northhouse Keshan.*

A. M.

1899
June 24; *July* 1.

In re AN ARBITRATION BETWEEN PEARSON AND I'ANSON AND ANOTHER.

Landlord and Tenant—Compensation for Improvements—Agricultural Holdings (England) Act, 1883 (46 & 47 *Vict. c.* 61), *s.* 57—*Right of Tenant to Compensation under Agreement.*

Sect. 57 of the Agricultural Holdings (England) Act, 1883, provides that, "a tenant shall not be entitled to claim compensation by custom or otherwise than in manner authorized by this Act in respect of any improvement for which he is entitled to compensation under or in pursuance of this Act":—

Held, that this provision only applied to a tenant claiming compensation under the Act, and did not exclude the right of a tenant to claim, under an agreement outside the Act, compensation for improvements in respect of which he might have claimed compensation under the Act.

AWARD made by an arbitrator in the form of a special case stated for the opinion of the Queen's Bench Division under the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 19, and an order of the Court made under that section.

The material facts stated in the award were as follows :—

Some time prior to the year 1871 William Pearson became tenant from year to year of about ten acres of land situate near to and subsequently forming part of a farm called Broom Hall Farm. Before and in the year 1871 the same ten acres of land were used and cultivated, and thereafter continued to be used and cultivated, by Pearson as a market garden.

The ten acres were, in 1871, purchased by George Lane Fox, to whose agent (G. A. B. Leatham) Pearson from time to time paid the rent accruing in respect thereof. During the year 1883 Pearson negotiated with Leatham, who was found in the award to have "acted as agent for George Lane Fox in the management of the latter's estates," for a tenancy by Pearson of Broom Hall Farm, and on October 30, 1883 (shortly before the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), came into force), an agreement was entered into between them in the following terms :—

"Wakefield, Oct. 30, 1883.

"I hereby agree to take for one year—namely, from the 1st day of January, 1884, to the 1st day of January, 1885—the farm in Wrenthorpe now occupied by George Thompson, the property of George Lane Fox, Esq., and containing 118A. 2R. 0P. more or less, at the yearly rent of two hundred and thirty-six pounds, payable quarterly, and subject to the same clauses and conditions as Mr. Fox's other tenants are subject to.

"And we hereby further agree to contract ourselves out of the Agricultural Holdings (England) Act of 1875.

"William Pearson.

"£236 : 0 : 0.

"I hereby agree to let the above on the terms specified.

"Gerald Arthur Buxton Leatham.

"William Pearson."

(A specimen form of the agricultural leases granted to George Lane Fox's tenants was annexed to the award.)

On December 30, 1884, in answer to an inquiry by Pearson, Leatham wrote to him a letter, saying, "your agreement for the farm you hold under Mr. Lane Fox includes the old

1899

PEARSON AND I'ANSON, *In re.*

take." At subsequent interviews between Pearson and Leatham the latter consented to the execution of extensive repairs to the farm buildings on Pearson's holding, which were thereupon carried out and paid for by Leatham as agent for George Lane Fox. Pearson continued to cultivate the ten acres of land as a market garden, but the residue of his holding was cultivated by him as ordinary agricultural land. In 1887, in answer to a letter written by Pearson to Leatham inquiring whether he (Pearson) would be allowed a market-garden valuation on quitting the farm if he were to continue tenant of the farm and cultivate it as a market garden, Leatham wrote as follows:—

"Estate office,
"Bramham,
"Tadcaster, May 4, 1887.

"Dear Sir,—I will allow you a market-garden valuation should you leave the farm you now occupy under G. Lane Fox, Esq.

"Yours truly,
"G. A. B. Leatham."

Pearson accordingly expended large sums of money (the aggregate amount of which was not proved in evidence) in the plantation of portions of the farm and its cultivation as a market garden, and in particular he erected forcing sheds and other fixtures, and planted many acres with rhubarb, fruit bushes, strawberries, mint, and various vegetable crops. (1)

(1) By s. 1 of the Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c. 27), "this Act shall be read and construed as part of the Agricultural Holdings (England) Act, 1883, hereinafter called 'the principal Act.'"

Sect. 3: "Where after the commencement of this Act it is agreed in writing that a holding shall be let or treated as a market garden, the following provisions shall have effect:—

"(1.) The provisions of s. 34 of the principal Act shall extend to every fixture or building affixed or erected by the tenant to or upon such holding for the purposes of his trade or business of a market gardener.

"(2.) The improvements numbered (1.) 'erection or enlargement of buildings,' (6.) 'making of gardens,' and (11.) 'planting of orchards or fruit bushes,' in Part I. of the first schedule to the principal Act shall, as far as regards such holding, cease to be comprised in the said schedule.

"(3.) The following improvements

He continued, however, to use a small portion of the farm for agricultural purposes only.

In July, 1896, the farm was offered for sale by public auction, and I'Anson and Calvert became the purchasers, and on December 14, 1896 (prior to the completion of the purchase), Pearson received from the agent of Fox a notice to quit, expiring as to the lands on January 1, 1898, and as to the buildings on May 1, 1898. No notice of intention to claim compensation was given within the time prescribed by s. 7 of the Agricultural Holdings (England) Act, 1883. Disputes and differences arose between Pearson and I'Anson and Calvert as to the amount (if any) of the compensation to which Pearson was entitled in respect of tenant right and improvements on quitting the lands and premises, and by memorandum of agreement made on February 2, 1898, all such disputes and differences were referred to an arbitrator to award and determine whether any valuation was payable by I'Anson and Calvert to Pearson. Since the arbitration I'Anson had died, and by consent his executors were substituted for him in the proceedings.

The questions of law raised by the case were (inter alia): First, that the letter of May 4, 1887, was, if an agreement, one beyond the authority of the agent of the landlord to make; that there was no consideration for the agreement alleged to have been made by that letter, and that in any event the letter could not extend to improvements commenced or executed after the date of it: Secondly, that the compensation claimed was in respect of improvements, for the whole of which the tenant was entitled to make a claim in accordance with the Agricultural Holdings (England) Act, 1883, and the Market

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shall, as far as regards such holding, be deemed to be comprised in Part III. of the said schedule:—

"(i.) Planting of standard or other fruit trees permanently set out;

"(ii.) Planting of fruit bushes permanently set out;

"(iii.) Planting of strawberry plants;

"(iv.) Planting of asparagus and other vegetable crops;

"(v.) Erection or enlargement of buildings for the purposes of the trade or business of a market gardener."

1899

PEARSON AND I'ANSON, *In re.*

Gardeners' Compensation Act, 1895, and that those Acts excluded the right of the tenant to claim compensation outside the Acts or otherwise than under them, and that by non-compliance with those Acts the tenant had lost his right to claim.

The arbitrator awarded—(1.) That, in the event of the Court being of opinion that Pearson was entitled to compensation for tenant right and improvements under the Agricultural Holdings (England) Act, 1883, and the Market Gardeners' Compensation Act, 1895, as though notice had been duly given under s. 7 of the earlier Act and all the requirements of that Act had been duly performed, I'Anson and Calvert should pay to Pearson 2115*l.* and certain specified costs:

(2.) That, if the Court should be of opinion that Pearson was not entitled to compensation under those Acts, but was entitled by agreement or otherwise to a market-garden valuation in respect of the plants and crops growing on the farm at the determination of his tenancy, I'Anson and Calvert should pay to him 1546*l.*, and should also pay certain valuer's charges and the costs of the award.

The award also provided for costs in the event of the Court being of opinion that Pearson was not entitled to any compensation for tenant right or improvements.

A. T. Lawrence, Q.C. (*Corrie Grant* with him), for Pearson. Admitting that Pearson is not entitled to compensation under the Agricultural Holdings (England) Act, 1883, and the Market Gardeners' Compensation Act, 1895, he is entitled under the agreement of May 4, 1887, to the sum awarded in the second part of the arbitrator's award as being due on a market-garden valuation. There was good consideration for that agreement because Pearson was about to improve the value of the land by turning it into a market garden. The agreement was one which Leatham, as the agent who managed George Lane Fox's estates, had authority to make.

Sect. 57 of the Agricultural Holdings (England) Act, 1883 (1),

(1) 46 & 47 Vict. c. 61, s. 57: "A tenant shall not be entitled to claim compensation by custom or otherwise than in manner authorized by

does not exclude Pearson's right under the agreement. At the termination of his tenancy he was not "entitled to compensation under or in pursuance of the Act," because he had not complied with the provisions of s. 7 as to notice. The latter part of s. 57 therefore applies, and he may recover compensation under the agreement apart from the Act. Sect. 57 does not deprive tenants of any right. It does not touch agreements for compensation; it only provides that where the tenant is entitled to and claims compensation under the Act he must use the machinery which the Act provides. Sect. 5 contains a reservation of the tenant's rights under agreements providing for specific compensation for improvements comprised in the 1st schedule, and s. 60 contains a general saving of the tenant's right under a custom or otherwise. The object of the Act was to confer rights, not to deprive the tenant of them. The decision of the Court of Appeal in *Newby* v. *Eckersley* (1) supports the contention that the Act does not interfere with such an agreement as this. "A tenant" in s. 57 means a tenant entitled to and claiming compensation under the Act. Sects. 55 and 57 are the only sections which touch this question, and neither of them apply to prevent this agreement being enforced. The case of *Gas Light and Coke Co.* v. *Holloway* (2) is not in point. There was no agreement for compensation outside the Act, and the decision only was that a tenant entitled to compensation under the Act must get it under the Act, and not by way of counterclaim to an action.

Danckwerts, and *R. A. Shepherd*, for the landlords, Calvert and the executors of I'Anson. Leatham had no authority to allow the alteration in the mode of cultivating Pearson's farm, or to promise a market-garden valuation, and the landlords are not bound by what Leatham did in that respect. The

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this Act in respect of any improvement for which he is entitled to compensation under or in pursuance of this Act, but where he is not entitled to compensation under or in pursuance of this Act he may recover compensation under any other Act of Parliament, or any agreement or custom, in the same manner as if this Act had not passed."

(1) [1899] 1 Q. B. 465.

(2) (1885) 52 L. T. (N.S.) 434.

1899

PEARSON AND I'ANSON, *In re.*

specimen form of lease annexed to the case is of a peculiar and special character, and precludes the idea that Leatham had authority. No express authority from the landlord has been proved or suggested. A bailiff or agent has no authority to let upon unusual terms unknown to the owner of the land: *Turner* v. *Hutchinson.* (1) There was no consideration for the agreement contained in Leatham's letter of May 4, 1887.

Next, the tenancy commenced after the Agricultural Holdings (England) Act, 1883, came into force, and the tenant was clearly entitled to compensation under that Act and the Market Gardeners' Compensation Act, 1895. Sect. 57 prevents him from setting up the agreement made in 1887. It is not an agreement saved by s. 60, which contains a general saving of rights existing at the time the Act was passed. The first branch of s. 57 excludes any claim to compensation otherwise than under the Act, where the tenant is entitled to claim compensation under the Act. The second branch only saves his right under a custom or agreement where he could not at any time claim under the Act. In order to come within that branch of the section he must be "entitled to compensation" in the sense of s. 1, which provides that he shall be "entitled on quitting his holding" to compensation. The word "entitled" is used with respect to the tenant's original right to compensation, not with respect to the means of enforcing that right. The tenant here was entitled to compensation under the Act on quitting his holding, and the fact that he omitted to give the notice required by s. 7 did not make him the less "entitled" in the sense intended by the Act. *Newby* v. *Eckersley* (2) is distinguishable. There the tenant could not have got compensation under the Act, because the agreement was a special agreement for the surrender of the tenancy. Sect. 55 avoids agreements by which the tenant is deprived of his right to claim compensation under the Act. Sect. 59 provides that "a tenant" shall not be entitled to compensation in respect of any improvements, other than manures, begun by him, if he holds from year to year, within one year before he quits his holding, or at any time after he has given

(1) (1860) 2 F. & F. 185. (2) [1899] 1 Q. B. 465.

or received final notice to quit. The words "entitled to and claiming compensation under this Act" cannot be read into s. 59 after the words "a tenant," as it is suggested they should be read into s. 57. Yet the "tenant" must mean the same thing in both sections. Sect. 54 of the Agricultural Holdings (England) Act, 1875 (38 & 39 Vict. c. 92), expressly reserved the right of landlords and tenants to contract out of the Act; but that section has been repealed by the Act of 1883, shewing the intention of the Legislature that the right to agree for compensation should not be allowed to co-exist with the right to compensation under the Act. *Gas Light and Coke Co.* v. *Holloway* (1) is an authority which supports that view.

A. T. Lawrence, Q.C., replied.

Cur. adv. vult.

July 1. The following judgment was read by

GRANTHAM J. In this case there are practically two questions we have to determine. First, whether the agent of Mr. Lane Fox had authority to enter into the agreement in question. Secondly, if he had authority, then does the Agricultural Holdings Act deprive the claimant for compensation of his rights under the agreement?

I can well understand that the present landlords, having recently bought the property to which the right to a valuation attaches, bought it in ignorance of the liability of the landlord under the agreement, because it seems that the letter of the claimant to the landlords' agent had been lost, and very likely the agent had kept no copy of his letter in reply to it, which two letters formed the agreement; but we have to determine the case between the present landlords and tenant under the contractual relations created between the tenant and the original landlord, Mr. George Lane Fox, and by these rights and relations the parties are bound.

Now, it was contended that express authority should have been proved to shew that the agent was enabled to make any other engagements for tenancy with the tenant than such as

(1) 52 L. T. (N.S.) 434.

1899

PEARSON AND I'ANSON, *In re.*

Grantham J.

were to be found in the model leases of the Bramham estate. But, as the case finds that the agent was the manager of the estate, and there is no limitation found to his powers as such manager, I think the onus was thrown on the defendants of shewing some limitation of the agent's power in such transactions as these in dispute—questions, it must be remembered, purely relating to the management of an estate. As he signed these leases or agreements in his own name without any procuration of or for his landlord, and writes, I notice, always in the first person in making the arrangements with the tenant, we must take it that he was possessed of the fullest authority an agent could have in all matters that came within the term "management of an estate," and I know of nothing so important or so thoroughly part of the good management of an estate as the judicious alteration of the style of farming or using of the land on an estate. Moreover, I think the model leases under which agricultural tenancies were supposed to be held on this estate (leases said to be nearly one hundred years old) can scarcely have been read when it was argued that the agent could not go outside their covenants, for I find that two of the covenants are of such a character that the agent's power of altering them could scarcely be objected to on behalf of the landlords. The first is that each tenant on the estate must keep a gamecock, and the other that he must keep a dog. The refusal to pay compensation to the tenant might as well be justified on the ground that the tenant had broken his agreement in not keeping either a gamecock or a dog. If the landlords could have proved as a fact the want of authority on the part of the agent they would have done so; but, not having done it, I have no doubt that their contention is unfounded, and that the claimant is entitled to succeed on that ground.

The next is a more difficult question—as to whether or not the Agricultural Holdings Act deprives the claimant of the rights he possessed under the agreement. Those rights turn out to be very valuable, but they do not give the claimant anything that he has not paid for; there is nothing allowed him for any profit on his outlay. The real question is whether the landlords are entitled to the benefit of the outlay of the claimant

by way of improvement upon their property without paying for it. It was to provide for this repayment for improvements that the Agricultural Holdings and Market Gardeners' Acts were passed; yet it was boldly contended that, though without the Act the plaintiff would have received this compensation, yet that the Act has advisedly taken away rights, which in this case are worth 1500*l.* at least, without any compensation at all.

I am not surprised that no authority can be found for this contention; nor am I surprised that no direct authority can be found against it, for no one has before been bold enough to suggest such a proposition; but the case of *Newby* v. *Eckersley* (1) may be read as supporting the view I am taking, though this point was not, I admit, directly before the Court of Appeal in giving their judgments.

The facts of the present case seem to me to afford a very good illustration of the working of the Act. Let us assume there had been no agreement, but that the tenant had planted the farm as a market garden, and enormously improved the value with the full knowledge and approval of the landlord, but without any agreement on his part to pay an increased valuation. He would then have been entitled to no compensation beyond the customary valuation for agricultural land, and that was justly felt such a grievance that an alteration in making valuations was desired, and the Act therefore states that, subject to questions of notice and approval by the landlord, the tenant shall have compensation; but as by some exceptional custom in some part of England he might have obtained some compensation for this improvement, the Act also states that if you take the benefit of the Act you must give up all other claims for compensation by custom for the same improvements; but if the tenant does not want to claim under the Act and is not claiming under the Act, then he is entitled to what the law will give him under the custom, or under any special agreement stating what his valuation is to be. So here, he was entitled by his agreement to have a valuation made in a particular way on his giving up his farm. The agreement was in writing and made since the passing of the Act, and as he claims nothing

(1) [1899] 1 Q. B. 465.

1899

PEARSON AND I'ANSON, *In re.*

Grantham J.

under the Act it binds the parties. It seems incredible that an Act which was especially intended to benefit the tenant should by its provisions, which must be assumed to have been known to the Legislature, injure him most seriously by depriving him of rights he previously possessed. In fact, it has been argued on behalf of the landlords that English landlords and tenants are not entitled to the liberty of freedom of contract, but that all their dealings are now to be regulated by the iron-bound regulations of an Act of Parliament which, though passed for the benefit of the tenant, is, if that argument be correct, the most iniquitous piece of legislation—of legalised robbery—that was ever introduced into the House of Commons.

What do the landlords get by reason of the tenant's expenditure? Much more than they pay. With an expenditure by the tenant of this money the rental value of the land has vastly increased. If the farm was worth 2*l.* per acre before, it is worth about 4*l.* now; and if you capitalise that extra 2*l.* at only twenty years' purchase you get a sum of about 4800*l.* in return for the 1500*l.* the landlords are asked to pay; whilst, under any circumstances, the landlords get another 500*l.* or 600*l.* worth of work for nothing, even if they pay the 1500*l.* now asked for, as the valuer has found by his award that, if the tenant is to be paid for the buildings, &c., he has erected, besides this disputed valuation, he would be entitled to 2000*l.* odd instead of 1500*l.* I have not forgotten that some small portion of the farm is still under arable cultivation, and therefore it must not be assumed that the rental of all the farm will have increased as I have suggested; but I have given the figures just mentioned to shew how the matter must be looked at to find whether or no the landlords are being treated unfairly in the matter.

For these reasons, it seems to me clear that by the latter portion of the 57th section of the Agricultural Holdings Act, 1883, Pearson is entitled to the valuation under the agreement entered into in 1887, and that that right is not nullified by the earlier words of the section, which, though very confused, can be interpreted logically in the way I have described; and if they are somewhat transposed and read in this way, "A tenant

shall not be entitled to claim compensation in respect of any improvement for which he is entitled to compensation under or or in pursuance of this Act, by custom or otherwise than in manner authorized by this Act," there is less difficulty, I think, in interpreting them, although grammatically their present reading is more correct. For these reasons, my judgment must be for the claimant, Pearson.

KENNEDY J. In the result I agree with the judgment which has been pronounced by my brother. Upon the first two points I entertain no doubt. The claimant here is the tenant. He was since 1871 tenant to Mr. Lane Fox, and the agency since 1871 was in the hands of Mr. G. A. P. Leatham, who is stated and found to have acted as agent in the management of the estate—in other words, he is the general manager of the estate. The tenancy created by the letter of October 30, 1883, was arranged and completed through Mr. Leatham, and in 1887 the tenant found that, in his words, "the farm was going from bad to worse," and he wrote the letter which has been lost, but of which parol evidence was given, stating that he wished to know whether he would be allowed a market-garden valuation on quitting the farm if he were to continue tenant of the farm cultivated as a market garden. On May 4, 1887, Mr. Leatham wrote in terms, in answer to that application: "I will allow you a market-garden valuation should you leave the farm you now occupy under George Lane Fox, Esq." Upon the faith of that letter the tenant expended large sums of money in carrying out the suggestion which had been accepted.

In the first place, counsel for the landlords argued that there was no sufficient proof of authority in the agent. I should be very sorry to hold, where the tenant has to deal with an agent in the position of Mr. Leatham, who is described as general manager of the estates through whom the lease has been given, and a question of cultivation of either the whole or part of the farm arises whilst the tenancy still continues, that the tenant was not entitled to rely on the assent in form in writing of the agent, but was bound, in order to be safe, to have authority from the landlord produced to him, or that the person who is

1899

PEARSON AND I'ANSON, *In re.*

Kennedy J.

described, as well as actually employed, as the manager of the estates has power only with the landlord's express consent to make any change in the manner of cultivation. Upon the faith of the document of May 4, 1887, large expenditure has been incurred. It was suggested that a heavy tax would be imposed on the landlord. For aught I know, what the tenant did has made very valuable the property which before was comparatively of little value. With that, however, I have nothing to do.

It appears to me that there was good consideration for the agreement, and that there was also authority in the agent to make it, and that both those points fail.

The one point upon which I confess I have felt hesitation is the construction of the statute. To my mind, s. 57 is a section which one can read over and over again without being very confident of what its meaning exactly is. It is a section which contains (and that, I think, is always an unfortunate piece of construction) first of all a negative statement, and then a positive statement withdrawing part of the negative statement. [The learned judge read s. 57.] That section was invoked and relied on by counsel for the landlords, and I come to the same conclusion as my brother Grantham for the following reasons—I think it possible reasonably to adopt the construction which has been given to s. 57 in the argument of counsel for the tenant, and it is, I think, a construction more in unison with the obvious intention of the Act. It is that the Act did not intend to say that the compensation must be only under the Act if a man could by taking certain steps bring himself within the Act. The marginal note to s. 57 does not assist in solving the difficulty. It is, "Compensation under this Act to be exclusive," and it rather increases than diminishes the difficulty. I think that the Act never intended, as s. 3 goes to shew, that agreements for good consideration should be treated as valueless when the tenant wishes to avail himself of them. Further, there is the construction which the Court of Appeal in *Newby* v. *Eckersley* (1) have put upon the Act. I agree that the decision does not expressly deal with the point before us; but

(1) [1899] 1 Q. B. 465.

I do not feel justified in differing from the construction of part of the words of s. 57 which is given in terms by A. L. Smith L.J. and by Chitty L.J., and is, I think, implied in the judgment of Collins L.J. According to those judgments the word "tenant" must be read by the light of the prior sections, and as meaning "a tenant claiming compensation under this Act." So reading the section, it is clear that the words, "a tenant claiming compensation under this Act," do not include the tenant in the present case. He is claiming under an agreement, as the tenant in *Newby* v. *Eckersley* (1) was, and if he is claiming under an agreement he is not excluded from the benefit of that agreement. The same reasoning must, I suppose, be applied to s. 59; so that the words, "claiming compensation under this Act," must be read into that section after the word "tenant."

For these reasons I am of opinion that the claim which the tenant makes here for the 1546*l.* ought to be allowed.

Judgment for Pearson accordingly.

Solicitors for Pearson: *Torr, Gribble, Oddie & Sinclair, for Stewart & Chalker, Wakefield.*

Solicitors for Calvert: *James & Mellor, for I'Anson, Benson & Co., Wakefield.*

Solicitors for I'Anson's executors: *Iliffe, Henley & Sweet, for H. Plews, Wakefield.*

(1) [1899] 1 Q. B. 465.

W. A.

1899
July 28.

THE QUEEN *v.* LEICESTER GUARDIANS.

Mandamus—Alternative Remedy—Legal Remedy—Duty of Guardians to appoint Vaccination Officer—Vaccination Act, 1871 (34 & 35 *Vict. c.* 98), *s.* 5.

The duty imposed upon guardians by s. 5 of the Vaccination Act, 1871, to appoint a vaccination officer may be enforced by a writ of mandamus upon the application of the Local Government Board.

RULE, obtained on behalf of the Local Government Board, for a mandamus to the Leicester guardians to appoint a vaccination officer for the parish of Leicester.

On December 31, 1898, the vaccination officer for the parish of Leicester having resigned, the office became vacant. The guardians resolved to defer consideration of the matter. On February 15, 1899, the Local Government Board wrote asking whether the guardians had appointed a vaccination officer, and on March 2 received a reply that an officer had not been appointed. The board wrote to the guardians several times upon the matter, and on May 3 received a reply, in the form of a memorial in which the guardians embodied their reasons for being averse to appointing a vaccination officer. On May 30 the board wrote to the guardians pointing out that it was their duty to appoint a vaccination officer without delay, and calling upon them to do so. On June 26 the board wrote to the guardians stating that, unless the necessary steps were at once taken with a view to the appointment of a vaccination officer, an application for a mandamus would be made to the High Court. The guardians did not, however, take any steps towards the appointment of a vaccination officer.

Upon July 18, upon the application of the Local Government Board, the Queen's Bench Division granted an order nisi calling upon the guardians to shew cause why a writ of mandamus should not issue directed to them commanding them to appoint a vaccination officer for the parish of Leicester.

Asquith, Q.C., and *Corrie Grant*, for the board of guardians, shewed cause. According to the well-settled principles which

govern the exercise of the discretion of the Court in relation to the granting of the prerogative writ of mandamus, this is not a case in which the writ ought to be granted. By s. 5 (1) of the Vaccination Act, 1871, it is rendered obligatory upon guardians to appoint and pay a vaccination officer, and then the section goes on to provide that the Local Government Board "shall have the same powers with respect to guardians and vaccination officers in matters relating to vaccination as they have with respect to guardians and officers of guardians in matters relating to the relief of the poor." Those powers are contained in s. 7 (2) of the Poor Law Amendment Act, 1868, which provides that, if guardians fail, for twenty-eight days after a requisition from the Local Government Board, to appoint an officer whom they are lawfully required to appoint, the board may by order appoint a fit person to be such officer and fix the salary to be paid to him by the guardians. Until 1871, it was optional whether a vaccination officer should be

(1) The Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 5: "Whereas under the principal Act the guardians of any union or parish may pay any officer appointed by them to prosecute persons charged with offences against that Act or otherwise to enforce its provisions, and it is expedient to render obligatory the appointment of such an officer: Be it enacted that the guardians of every union and parish shall appoint and pay one or more of such officers (in this Act referred to as 'vaccination officers') . . . .

"Subject to the provisions of this Act, the Poor Law Board shall have the same powers with respect to guardians and vaccination officers in matters relating to vaccination as they have with respect to guardians and officers of guardians in matters relating to the relief of the poor, and may make rules, orders, and regulations accordingly, and all enactments relating to such powers, and to such orders, rules, and regulations, shall apply mutatis mutandis . . . ."

(2) The Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 7: "In case the board of guardians fail for twenty-eight days after receipt of a requisition of the Poor Law Board in that behalf to appoint, either originally or on a vacancy, any officer whom they shall be lawfully required to appoint, the Poor Law Board may, at any time after the expiration of the said term of twenty-eight days, if they think fit, by order under their seal, appoint a fit person to be such officer, and determine the salary or remuneration to be paid to him by such guardians; and the person so appointed shall recover such salary or remuneration by action in a county or other court of law against such guardians, and shall have all the same powers, rights, and privileges, and shall discharge all the same duties, and incur the same responsibilities, as if the appointment had been duly made by the said guardians."

1899

REG. v. LEICESTER UNION.

appointed or not, and the statute of 1871, which made the appointment compulsory, gave the Local Government Board power to appoint an officer if the guardians failed to do so. It is submitted, therefore, that, as the Legislature when imposing this duty also provided a remedy for any default in performance of the duty, this is not a case in which, according to the rules of this Court, a mandamus ought to be granted.

A mandamus will not be granted where there are any other lawful means open to the applicant of obtaining the same result: *Rex* v. *Bank of England* (1); *In re Nathan.* (2)

It is not necessary that the alternative remedy should be by any form of legal procedure, but the rule applies where the same result can be attained by any lawful act of the applicant.

Where a statute creates a duty and at the same time provides the means of making good any default in its performance, the remedy so given must be deemed to be exclusive. It is conceded that the Local Government Board can enforce by mandamus the observance of the Vaccination Acts in many matters: *Reg.* v. *Lewisham Union* (3); but in this particular instance the Legislature has made a special provision by giving the board power themselves to make the appointment. The case of *Reg.* v. *Keighley Union* (4) is not really an authority against the respondents, for the judgment in that case was given upon the return to the mandamus, and not upon the application for the writ.

[PHILLIMORE J. referred to *Sheppard* v. *Phillimore.* (5)]

Schultess Young, shewed cause for two of the guardians. [He cited *Rex* v. *Mayor, &c., of Fowey* (6); *Reg.* v. *Gamble* (7); Tapping on Mandamus, pp. 10, 18, 21; *Bramble* v. *Lowe.* (8)]

Sir R. B. Finlay, S.-G., and *H. Sutton*, in support of the rule. The law is clear, and ought to be enforced by this Court. Sect. 5 of the Vaccination Act, 1871, imposes a plain and imperative duty upon the guardians. It is not conceded that

(1) (1780) 2 Doug. 524, 526.
(2) (1884) 12 Q. B. D. 461.
(3) [1897] 1 Q. B. 498.
(4) (1875) 39 J. P. 309, 360; (1876) 40 J. P. 70.
(5) (1869) L. R. 2 P. C. 450.
(6) (1824) 2 B. & C. 584.
(7) (1839) 11 Ad. & E. 69.
(8) [1897] 1 Q. B. 283.

the Local Government Board have power to appoint a vaccination officer if the guardians fail to do so; but, assuming that there is this power, that is no answer to the application for a mandamus to compel the guardians to do their duty. The duties of a vaccination officer are many and various and are not confined to the institution of prosecutions. The cases which have been cited to shew that the existence of another remedy will prevent the Court in the exercise of its discretion from granting the writ of mandamus have no application in the present case. The rule is clearly stated by Hill J. in *Re Barlow* (1), that there must be another remedy "equally convenient, beneficial, and effectual." In all the cases which have been cited a "legal" remedy, a "remedium juris," was referred to. In *Reg.* v. *Gamble* (2) the remedy referred to was a legal remedy conferred by statute upon the applicants. There is no trace in any of the cases of any rule that any other possible course of action than legal proceedings equally convenient, beneficial, and effectual will be a ground for refusing a writ of mandamus. The case of *Reg.* v. *Norwich and Brandon Ry. Co.* (3) negatives any such rule. There must be an equally efficacious remedy by process of law, and that rule has never yet been extended to a case where there may be a remedy by act of the party. In *Reg.* v. *Keighley Union* (4) Cockburn C.J. said that the opinion of the Court was that the guardians were not relieved from performing the duty cast upon them because there was power in the Local Government Board to perform it. That disposes of the contention of the respondents that the writ ought not to be granted here because the board have power to appoint a vaccination officer. It is the duty of the guardians to appoint, and a mandamus is the only way in which the performance of that duty can be obtained. In *Rex* v. *Archbishop of Canterbury* (5) Lord Ellenborough said that the Court would grant the writ "where there is no other specific legal remedy for a legal right." That which the

(1) (1861) 30 L. J. (Q.B.) 271.
(2) 11 Ad. & E. 69.
(3) (1845) 3 D. & L. 385.
(4) 39 J. P. 309, 360; 40 J. P. 70. The shorthand notes of the proceedings reported in 39 J. P. 360 were referred to.
(5) (1812) 15 East, 117, 136.

1899

REG. v. LEICESTER UNION.

respondents say is an alternative remedy is not the same thing at all as the performance of their duty by the guardians. The position of a vaccination officer appointed by the board would not be the same as if he were appointed by the guardians. He might have to litigate with the guardians the question whether the board had power to appoint him.

DARLING J. The respondents are shewing cause against a rule nisi for a mandamus granted against them, and the question depends in the first instance upon what they have done or omitted to do under s. 5 of the Vaccination Act, 1871, which enacts: [The learned judge read the section.] That section shews that under the Act governing the matter, until the Act of 1871 was passed, guardians could act or not as they pleased with respect to the appointment of vaccination officers, and that the Legislature then declared that it was expedient to render it obligatory that guardians should appoint a vaccination officer. There is, by this section, cast upon the guardians an absolute duty to appoint a person to be called the "vaccination officer," and their option is entirely taken away. The section goes on to provide that the "Poor Law Board shall have the same powers with respect to guardians and vaccination officers in matters relating to vaccination as they have with respect to guardians and officers of guardians in matters relating to the relief of the poor." Among other things which the board may do with respect to officers for the relief of the poor, s. 7 of 31 & 32 Vict. c. 122, provides that if guardians fail, for twenty-eight days after receipt of a requisition from the board, to appoint any officer whom they shall be lawfully required to appoint, the board may, after the expiration of that time, if they think fit, by order appoint a fit person to be such officer.

Now it is said here that, if the guardians fail to do that which the statute has said it shall be obligatory upon them to do, the Local Government Board thereupon have power to appoint a person to do the work which is left undone because the guardians have refused to perform the duty which the law has cast upon them. It is not—and I think it is necessary that this should be understood at the outset—that the Local

Government Board have the power conferred upon them to do the same thing as the guardians are required to do. The guardians are required by statute to do a certain thing, and, if they fail to do it, they fail in the performance of a public duty; and it is provided that, if they fail in the performance of that public duty, the public shall not thereby necessarily suffer, for, although the Local Government Board cannot do the same thing in the first instance, they have the power as far as possible to do away with any such public inconvenience or danger as might be caused by the refusal of the guardians to perform their legal obligations. The Local Government Board are able to appoint a person to do the same thing; but, if they do not pay him, he is not in the same position as if the guardians had themselves appointed him, although he has the same duty to perform under the Vaccination Acts.

Here the Leicester guardians have been called upon by the Local Government Board to appoint a vaccination officer, but have failed to do so. The facts stated in the affidavit upon which the rule was obtained are not contested, and it appears that the guardians have absolutely and repeatedly, and after consideration, refused to do that which the statute has said they shall do. Thereupon the Local Government Board, instead of appointing an officer to do the work, have applied to this Court for a mandamus. The respondents contend that a writ of mandamus should not be granted, and for these reasons. They say that a mandamus ought not to be granted where there are any other lawful means open to the applicant to obtain the same result. Many authorities have been cited, but I think that they do not establish that contention. They have further contended that, where a statute creates a duty and provides a means of making good a failure to perform that duty, such means must be deemed to exclude the right of this Court to grant a mandamus. That proposition also is not, in my opinion, established. Now, upon what rule ought we to proceed? It must be remembered that this prerogative writ of mandamus is in the discretion of the Court. It is true that, in the past, the Court has laid down certain rules for future guidance, according to which it will or will not grant this writ.

1899

REG. v. LEICESTER UNION.

Darling J.

It must, however, be remembered that it by no means follows that, because the Court has in many cases refused to grant the writ, it had not power to do so within the rules which govern its action. The Court may well have the power, but in a particular case may think that it is not advisable to grant a writ of mandamus, which is discretionary. Therefore, when a case is cited to shew that in that particular case the Court did not grant the writ, it by no means follows that any kind of principle is established. Now it is said, and I agree, that this is a writ which should be granted only where there is no other remedy. In *In re Nathan* (1) it was said most felicitously by Bowen L.J.: "A writ of mandamus, as everybody knows, is a high prerogative writ, intended for the purpose of supplying defects of justice. By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of mandamus is granted to enable justice to be done." Counsel for the respondents invited us to interpret that to mean that in this case justice did not require the granting of this writ because the Local Government Board had themselves power to appoint an officer. I think that justice there means justice as it is meted out to persons in these Courts as between party and party. To use the Latin words which have been quoted, I think that justice there means remedium juris. Here it is contended that the writ should not be granted because there is another remedy—that is, because the Local Government Board, instead of compelling the guardians to perform their duty, may permit the guardians to refuse to perform a public duty imposed by statute, and may themselves do the same thing, or something like it; that is to say, that this Court might for that reason overlook the refusal of the guardians to perform a public duty. Now I take it that the kind of remedy spoken of is the kind of remedy referred to by Lord Ellenborough in *Rex* v. *Archbishop of Canterbury* (2), where he says: "There have been many dicta of judges cited, from none of which am I prepared to differ, or to deny to any of them their proper weight and authority: the result of them is in effect this, that this Court,

(1) 12 Q. B. D. 461, 478. (2) 15 East, 117, 136.

in the exercise of its authority to grant the writ of mandamus, will render it as far as it can the suppletory means of substantial justice in every case where there is no other specific legal remedy for a legal right." What other "specific legal remedy for a legal right" is suggested in this case? I can see none. The legal wrong is that the guardians will not perform their statutory duty. What legal right or way of compelling the guardians to perform that duty is there except this? There is none. What is suggested is, not that there is another remedy to compel the guardians to do their duty, but that there is another means of getting done that which the guardians have refused to do, or something which will do as well. That is not, however, the same thing as another "specific legal remedy for a legal right" to have the guardians do that which the statute has ordered them to do. It seems to me, therefore, that an appointment by the Local Government Board after the guardians have failed to do their duty is not a remedy in the sense of any of the judgments cited. With regard to this, I should like to adopt the words of Hill J. in *Re Barlow* (1): "It is well settled that where there is a remedy equally convenient, beneficial and effectual, a mandamus will not be granted. This is not a rule of law, but a rule regulating the discretion of the Court in granting writs of mandamus; and unless the Court can see clearly that there is another remedy equally convenient, beneficial and effectual, the writ of mandamus will be granted, provided the circumstances are such in other respects as to warrant the granting of the writ." In my opinion this alternative power of appointment by the Local Government Board is not strictly speaking a remedy at all; it is not remedium juris. I do not think that it is a remedy in the sense in which Lord Ellenborough used the words "specific legal remedy for a legal right"; but, even if it were, I should have to inquire whether it was a remedy "equally convenient, beneficial and effectual." If it is not, the writ ought to be granted. In my opinion, it cannot be contended for a moment that this, even if it be a remedy, is equally convenient, beneficial, and effectual; and therefore I think that

(1) 30 L. J. (Q.B.) 271.

1899

REG. v. LEICESTER UNION.

the writ ought to be granted, and that the rule must be made absolute.

PHILLIMORE J. I am of the same opinion and for the same reasons. I so entirely agree with what my brother Darling has said that I will add but few words. Here is a plain duty, imposed by statute, upon the guardians to appoint a vaccination officer. That duty is not denied. It is not contended that that is not the effect of the statute and that the duty does not exist. It is not denied that the guardians have refused to discharge that duty. What, then, is the objection to this rule being made absolute? The objection is one which is well worthy of consideration, but is wholly apart from the merits of the case, namely, that the duty which the guardians ought to perform can be discharged by the Local Government Board in another way. For the purposes of this case, I will assume that the board have power to appoint a vaccination officer if the guardians fail to do so. Is that a reason why a public body should not be compelled to perform its statutory duty? The cases which have been cited are all cases where an application has been made by a private individual in order to compel a person, no doubt holding a public office, to discharge his duty, and the Courts have found that by some other legal method of procedure the same result can be arrived at. To put the point shortly, where there is a remedium juris, the Court will not in its discretion grant a writ of mandamus; but where there is no remedium juris, no other way in which the Courts can act, then it is the duty of the Court to grant a mandamus. Many authorities have been cited and referred to; but, after considering them all, there is only one which comes anywhere near this case, and that is *Reg.* v. *Gamble.* (1) That, no doubt, is a remarkable case, because there the party making the application for a mandamus was not sent to some other Court or to some other form of action by which to assert his right, but he was told that he could be himself the judge and procure his own justice. Still, in that case the party was told to exercise a legal process, although in a very peculiar way. All the other

(1) 11 Ad. & E. 69.

cases are summed up by Lord Ellenborough in *Rex* v. *Archbishop of Canterbury* (1), which has been referred to by my brother. I agree, therefore, that the rule should be made absolute.

1899

REG. v. LEICESTER UNION.

Sir R. B. Finlay, S.-G., applied that the rule should be made absolute for a peremptory writ in the first instance, there being no facts in dispute, as was done in *Reg.* v. *Mayor, &c., of Bangor.* (2)

Rule absolute accordingly.

Solicitors for applicants: *Sharpe, Parker, Pritchards & Barham.*

Solicitors for respondents: *Bower, Cotton & Bower, for Sir Thomas Wright, Leicester.*

W. A.

[IN THE COURT OF APPEAL.]

C. A.

1899

June 28.

GORDON *v.* STREET.

Contract—Loan of Money—Fraud—Concealment of Identity of Lender—Right of Borrower to Repudiate.

The plaintiff, a money-lender, advertised under a fictitious name, and the defendant borrowed money and gave a promissory note to secure the sum borrowed and interest. In an action on the promissory note the jury found that the plaintiff intentionally concealed his identity to induce the defendant to borrow money of him as if from another, and that the defendant was so induced; that the plaintiff did so fraudulently; that the defendant entered into the contract believing that he was doing so with a person of the fictitious name given by the plaintiff, and that the defendant repudiated the contract within a reasonable time after he discovered that the plaintiff was the person with whom he had contracted:—

Held, that the fraudulent concealment by the plaintiff of his identity with a person whose reputation in business was such that the defendant would not have dealt with him was material to the inducement which brought about the contract, which the defendant was therefore entitled to repudiate within a reasonable time after the discovery of the fraud.

APPEAL from the verdict and judgment at the trial before Bucknill J. with a jury.

(1) 15 East, 117.

(2) (1886) 18 Q. B. D. 349, 360.

C. A. 1899

GORDON v. STREET.

The action was brought by the plaintiff upon a promissory note for 150*l.*, dated August 19, 1898, made by the defendant.

The defendant pleaded that he had been induced to borrow the money and to give the promissory note by the fraudulent misrepresentation of the plaintiff that he was one Addison, and that he, the defendant, would not have done so if he had known that Addison was in fact the well-known money-lender Isaac Gordon; and that he had repudiated the contract within a reasonable time after he discovered that Addison was Gordon.

The defendant paid 110*l.* into court in satisfaction of the claim. There was a counter-claim for libel, but the arguments and judgments on this point are omitted.

In August, 1898, the defendant was desirous of borrowing 100*l.*, and he saw in a daily newspaper the following advertisement, which had been inserted by the plaintiff:—

"Money promptly and privately advanced in sums of 50*l.* to 50,000*l.* to nobility . . . . ladies and gentlemen . . . . on their own promissory note . . . . without any unnecessary routine, securities, or preliminary fees, at about one-tenth of the interest charged elsewhere. The strictest privacy guaranteed, and those in need of financial accommodation without any of the objectionable features of the ordinary loan office are cordially invited to apply to me personally or by letter.—George James Addison, 3, Holles Street, Cavendish Square."

The defendant applied for and obtained a loan of 100*l.* from Addison, for which he signed a promissory note for 150*l.*, which included 50*l.* for interest. The money was payable by instalments, and it was provided that in default of payment of any instalment the whole amount was to become due. The defendant made default in payment of the first instalment.

A correspondence then ensued, conducted at first between the defendant and "Addison," and, on December 20, 1898, the defendant discovered that Addison was in fact Gordon, the present plaintiff.

The action was commenced on December 28, and a formal repudiation of the contract was made by the defendant's solicitor on January 6, 1899, and an offer was made to repay the 100*l.* with interest at 10 per cent.

The questions left to the jury and the answers thereto were as follows:—

(1.) Did the plaintiff intentionally conceal from the defendant that he was Isaac Gordon to induce him (the defendant) to borrow money from him as if from another, and, if so, was the defendant so induced?—Yes. (2.) Did he, Isaac Gordon, do so fraudulently?—Yes. (3.) Did the defendant contract with Addison believing him to be a money-lender of that name?—Yes. (4.) Did the defendant repudiate the contract so soon as, or within a reasonable time after, he discovered that Addison was really Gordon?—The defendant repudiated the contract within a reasonable time after he knew he could do so.

Judgment was entered for the defendant.

The plaintiff appealed.

June 16. *M. Shearman*, for the plaintiff. A man is entitled to trade in a name other than his own, and, so long as there is no illegality, a contract so made is valid. It was no part of the bargain in this case that the lender should be some one other than Gordon. If such a representation had been directly made it would not have been a material inducement to the contract, for the identity of the person with whom the contract is made is immaterial except in cases of personal skill or the like. A borrower has to pay according to the terms of his contract with whomsoever it is made, and whether the person whom he has to pay is the original lender or his assignee.

There was no evidence of repudiation in a reasonable time; on the contrary, there are letters affirming the contract after the defendant knew the facts.

Hugh Fraser, for the defendant. The concealment was material in the view of both the plaintiff and the defendant. The plaintiff treats his identity as material by the care with which he conceals it, and the defendant would not have contracted with the plaintiff under his own name. The defendant was induced to make the contract by the concealment of a material fact, and the jury have found that he repudiated within a reasonable time after discovering the facts. There was no affirmation of the contract by the defendant after he discovered

C. A. 1899

GORDON v. STREET.

the real facts, but only suggestions for compromise which did not prevent the subsequent repudiation.

M. Shearman, in reply.

Cur. adv. vult.

June 28. A. L. SMITH L.J. read the following judgment:—The question in this case is whether a person, whose evil reputation in business is such that no man will deal with him, can, after fraudulently concealing his identity and thus inducing another to enter into a contract which he otherwise would not have done, prevent that other, when sued by the defrauding party upon the contract, from insisting upon the ordinary defence of the defrauded—namely, that he had been induced by the fraud of the plaintiff to enter into the contract sued on.

The plaintiff, Isaac Gordon, is a money-lender, and he sues the defendant upon his promissory note for 150*l.*, dated August 19, 1898, in favour of George James Addison, to secure an advance of 100*l.*, the extra 50*l.* being for interest. Whether George James Addison is a fictitious name or that of the plaintiff's manager I do not know, for, although the plaintiff swore in the box that it was a fictitious name, I find him writing to the defendant as late as December 28, 1898, that the defendant was to address all communications to the plaintiff and not again to "my manager, Mr. Addison, of my London office, as the matter is entirely out of his hands, and I have given him instructions not to have anything more to do with the matter." On which side lies the truth as to this I do not know, but I will assume that the name is fictitious, as the plaintiff swore. In the view I take of this case it is immaterial whether it be so or not, for to liken this case, as it has been, to that of a person trading under a firm's name, or to that of an agent contracting in his own name for an undisclosed principal, is to liken it to that with which it has no similitude, and really has nothing in common.

The defence of the defendant is that he was induced to borrow the money and to sign the note sued on by the fraud of the plaintiff, and that upon discovering the fraud he repudiated the transaction.

The questions which were left to the jury by my brother Bucknill and the answers thereto were these: (1.) Did the plaintiff intentionally conceal from the defendant that he was Isaac Gordon to induce him (the defendant) to borrow money of him as if from another, and, if so, was the defendant so induced?—Yes. (2.) Did he—i.e., Isaac Gordon—do so fraudulently?—Yes. (3.) Did the defendant contract with Addison believing him to be a money-lender of that name?—Yes. (4.) Did the defendant repudiate the contract so soon as, or within a reasonable time after, he discovered that Addison was really Gordon?—The defendant repudiated the contract within a reasonable time after he knew he could do so.

It was argued for the plaintiff that these findings were immaterial, because the fraud proved was not material to the contract sued on; for, said he, whether the defendant contracted with Isaac Gordon or with any other lender of money to take a loan of 100*l.* and pay 50*l.* for it, it was the same thing to the defendant, for, when the day of payment arrived, the defendant by law would have to pay the money contracted to be paid to whomsoever he had contracted to pay it, and it mattered not to him who that person was.

In my opinion the first point which arises is not whether the fraud was material to the contract entered into, but whether the fraud was material to the inducement which brought about the contract; and, if so, the jury having found the fact of fraud, I cannot doubt that the fraudulent concealing of the plaintiff's name was that which induced the defendant to enter into the contract upon which he is now sued, and was therefore material to the inducement. On what ground is it to be said that a defendant who has been induced by fraud into signing a contract cannot, when sued upon it, set up the well-known defence that he was induced by the fraud of the plaintiff to enter into it? If the fraud be material to the inducement, it appears to me plain that he can. And, further, I will say that to enter into a contract for a loan with a creditor such as Isaac Gordon (I will give his own description of himself in a moment) so that, when the day for payment arrives, the borrower can have no possible chance of a day's or even an hour's grace, but

C. A. 1899

GORDON v. STREET.

A. L. Smith L.J.

on the contrary has the certainty of being pestered with writs and threats of writs and bailiffs and bankruptcy notices (see plaintiff's letter of December 19, 1898, under the name of Addison, about which hereafter), whereby life is rendered unbearable, and health is often injured, is by no means, in my opinion, the same thing as entering into a contract for a loan with a man who, when the day of payment arrives, does none of these things, but, on the contrary, deals in a fair and non-oppressive manner; and to contract with the oppressive class is very much to the detriment of the borrower. I am by no means prepared to say that the fraud in this case was not material to the contract itself. But, whether it be so or not, I will refer to a passage in the judgment of the Lord Chancellor (Lord Chelmsford) in the House of Lords in *Smith* v. *Kay* (1), when dealing with the contention of the immateriality of a representation, which passage is very much in point. He says: "But can it be permitted to a party who has practised deception, with a view to a particular end, which has been attained by it, to speculate upon what might have been the result if there had been a full communication of the truth?" I apply this to the present case. There is also a passage in the judgment of the Master of the Rolls (Sir John Romilly) in *Pulsford* v. *Richards* (2) pertinent to this question, but I need not cite it at length.

It was pressed upon us in argument that, if we upheld the verdict and judgment given against Isaac Gordon in this case, no money-lender hereafter would be able to trade excepting in his own name, and that this would be most detrimental and unjust to the community. But this is not so, and in deciding this case I decide nothing of the kind, for I would point out that amongst money-lenders, as in other ranks of life, there are many given to fair dealing and others given to the most rapacious tyranny known to mankind; and, if a money-lender of the first kind honestly trades in an assumed name, that is one case, and clearly not this case; but if a money-lender of the second kind secretes his own name and uses another name for the

(1) (1859) 7 H. L. C. 750, at p. 759.

(2) (1853) 22 L. J. (Ch.) 559, at p. 562.

express purpose of fraudulently inducing a man to trade with him and to get that man into his clutches, that is altogether another and a different case, and the two are entirely distinct.

The defendant in this case is a gentleman who, in the month of August, 1898, was desirous of borrowing 100*l.*, and the following advertisement attracted his attention: "Money promptly and privately advanced in sums of 50*l.* to 50,000*l.* to nobility . . . . ladies and gentlemen . . . . on their own promissory note . . . . without any unnecessary routine, securities, or preliminary fees, at about one-tenth of the interest charged elsewhere. The strictest privacy guaranteed, and those in need of financial accommodation without any of the objectionable features of the ordinary loan office are cordially invited to apply to me personally or by letter." (Signed) "George James Addison, 3, Holles Street, Cavendish Square."

A passage from Pothier, Traité des Obligations, s. 19, cited by Fry J. in *Smith* v. *Wheatcroft* (1)—in which case, however, the learned judge expressly held that there had been no fraud—seems to me to be important, supposing there was no fraud applicable to the present case, and I will cite the passage. It is this: "Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. . . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand."

Now, the advertisement above mentioned points out that George James Addison, with whom the defendant thought he was contracting, was not as ordinary loan offices were, and that he traded at one-tenth of the interest charged elsewhere, and this appears to me to afford evidence that with a man trading

(1) (1878) 9 Ch. D. 223.

C. A. 1899

GORDON v. STREET.

A. L. Smith L.J.

as Addison said he did the defendant was willing to contract, and that the consideration of the person did enter into the contract, and upon this ground, apart from fraud, the contract ought not to stand. But in this case there is the additional element why the contract ought not to stand, namely, the undoubted fraud of Isaac Gordon, who is now suing upon the contract induced by his own fraud.

I must here state who the plaintiff Isaac Gordon is; and, in order that there may be no inaccuracy, I will cite only from his own letters and his own admissions as to what manner of man he is. He describes himself in writing when pressing the defendant as "the extortionate and usurious money-lender with about a gross of aliases, and that he is the hottest and bitterest of creditors." He admits that he is not a British subject, but was born in Russia, and has been convicted of fraud, and has charged 3000 per cent. interest, but would not say if he had charged 5000 per cent.; that he carried on business under six or eight different aliases at Birmingham, Bristol, Bath, Manchester, Liverpool, Oxford, London, and Leeds. I find in a letter which he wrote to the defendant that he expresses himself thus: "I will make it as hot and as bitter as I possibly can for you, upon which you may stake your life." Such is the man from his own description and admissions, and no wonder that such was the odium into which he had got in the public eye as a lender of money that he found it necessary to give instructions to his clerks when dealing with his customers, which instructions were "to be strictly observed and rigorously carried out," which amongst other things contained as follows: "(4.) The greatest care must be taken that they (the customers) should not be able to smell a rat or to let them (the customers) in any way whatever get any wiser or lead them to think that the different names they are dealing with are one and the same person, or it is simply ruin." Can more cogent evidence exist of the plaintiff's own view as to the materiality of the suppression of his identity when inducing customers to enter into contracts?

The defendant stated, and the jury believed him, that if he had known that Addison was Gordon he would not have

answered his advertisement or signed the promissory note, and that he would have done anything rather than go to Gordon; that he had known of Gordon from what he had read, and that he believed the advertisement of Addison was one by a person of that name. I have not the slightest doubt that the findings of the jury on the questions left to them upon this part of the case were absolutely accurate, and should be upheld.

It was then argued for the plaintiff that, even if so, the defendant, when he found out that the person who was pressing him for payment of 150*l.* was Isaac Gordon, did not repudiate the note in time, for he did not do so until January 6, 1899, whereas he had found out that Isaac Gordon was the man upon December 20, 1898. In my judgment, when a person is defrauded into making a contract under which he takes a benefit, he has upon discovering the fraud the right to elect whether he will continue to treat the contract as binding or will disaffirm it. To cite from the judgment of the Exchequer Chamber in *Clough* v. *London and North-Western Ry. Co.* (1): "In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election?" Upon December 18, 1898, before the defendant had found out that it was Isaac Gordon who was pressing him upon his promissory note given in favour of Addison, he made an offer to Addison to pay the 150*l.* by instalments. This was answered by a letter of December 19 in the name of Addison which contains the passage: "I hope to teach you and let you know that the usurer whom you are dealing with in the present instance is one of the hottest creditors you have ever had, and take it from me, Mr. Street, that before you will get out of your obligation to me you will find it a bitter task and a very hard job, and on account of your letter of this morning I will make it as hot and as bitter as I possibly can for you, upon which you may stake your life. The next you will hear from me will be a writ and bailiffs, then bankruptcy if necessary." This letter being apparently typical of Isaac Gordon the defendant obtained information that it

(1) (1871) L. R. 7 Ex. 26, at p. 35.

C. A. 1899

GORDON v. STREET.

A. L. Smith L.J.

was his, and upon the next day the defendant wrote charging Addison with being "the notorious Gordon," and stating "you've had your offer, and as you won't take it you'll only have yourself to thank when you get nothing," and suggested some arrangement in the matter. On December 28, 1898, Isaac Gordon for the first time wrote to the defendant disclosing his identity and suggesting some amicable arrangement, and he issued a writ against the defendant; and on the next day, December 29, the defendant wrote to Gordon stating that he had sent the writ on to his solicitor, and asking Gordon in the future to write to him. On the next day Gordon wrote a most abusive letter to the defendant, which forms one of the subject-matters of the counter-claim for libel in this action, which was answered by the defendant on January 1, 1899, and on January 6 his solicitor wrote to the plaintiff's solicitor, stating clearly how the defendant had been defrauded into accepting the loan, and stating that he had no desire to avoid payment of the money borrowed at a reasonable rate of interest, and that he was therefore willing to repay the 100*l.* advanced together with 10*l.* for interest, and he added, "if this offer is not accepted we shall defend the action."

I cannot find upon the facts of this case that the defendant elected not to avoid the contract, but, on the contrary, he clearly elected to avoid it on January 6, 1899. The Exchequer Chamber in *Clough* v. *London and North Western Ry. Co.* (1) held that, though lapse of time without rescinding will furnish evidence that the person defrauded has determined to affirm the contract, and when the lapse of time is great it probably would in practice be treated as conclusive evidence to shew that he has so determined, yet, as Mellor J. said in delivering the judgment of the Court (1): "We cannot see any principle, and are not aware of any authority, for saying that the mere fact that one who is a party to the fraud has issued a writ and commenced an action before the rescission, is such a change of position [of the defrauding party] as would preclude the defrauded party from exercising his election to rescind. Neither can we see the principle or discover the authority for

(1) L. R. 7 Ex. 26, at p. 35.

saying that it is necessary that there should be a declaration of his intention to rescind prior to the plea." Under his plea the defendant paid into court 100*l.*, together with 10*l.* for interest. In my opinion, considering what was taking place, the lapse of time between December 20, 1898, or possibly December 28, when Gordon first disclosed his identity, and January 6, 1899, is not such as to lead to the conclusion that the defendant had elected not to avoid the contract, but, on the contrary, he has elected to avoid it, and the jury, in my opinion, were well warranted in answering the fourth question as they did, and there is good evidence to support it. In my judgment, the verdict and judgment must stand, and the appeal must be dismissed.

Rigby L.J. agrees in this judgment.

VAUGHAN WILLIAMS L.J. I entirely agree. I only wish to mention the case of *Moorhouse* v. *Woolfe* (1) as shewing how, in this case, the fact of the issue of the advertisement, which was issued by the plaintiff, made the misrepresentation contained in it material to the inducement to the contract, so as to entitle the defendant to take the course which he has done.

Appeal dismissed.

Solicitor for plaintiff: *D. Davis.*
Solicitors for defendant: *Jekyll & Green.*

(1) (1882) 46 L. T. 374.

A. M.

1899
July 26, 27.

THE GREAT NORTHERN RAILWAY COMPANY *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—"Release or Renunciation of Property upon a Sale"—Receipt for Compensation for not Working Coal adjacent to Railway—Right of Support—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 78.

A railway company having given notice under s. 78 of the Railways Clauses Consolidation Act, 1845, to a colliery company not to work certain coal under and adjacent to their railway, compensation therefor was assessed. The colliery company gave the railway company a receipt under seal for the amount of the compensation, in which they undertook to leave the coal in question unworked, and further undertook to do and execute all deeds, matters, or things necessary for vesting the same in the railway company whenever required, and the document continued: "We further acknowledge and declare that the said sum includes satisfaction and compensation for all claims which but for these presents we might have maintained, either under the provisions of any statute, or at law or in equity, against the railway company in respect of the said coal":—

Held, that the document was not a release or renunciation of property, or of any right or interest in property, upon a sale, and was, therefore, not chargeable with ad valorem duty, but that it was a release of an interest in property, and should, therefore, bear a 10*s.* stamp.

Case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

On December 10, 1898, the Great Northern Railway Company presented an instrument, of which the following is a copy, to the commissioners for their opinion as to the stamp duty with which it was chargeable:—

"We, the Middleton Estate and Colliery Company, Limited, having our registered office at Middleton, in the parish of Rothwell and county of York, the owners in fee simple free from incumbrances of the coal hereinafter described, except the portion thereof comprised in the lease hereinafter referred to, of which portion we were at the date of the notice hereinafter referred to the lessees, hereby acknowledge to have received from the Great Northern Railway Company (hereinafter called 'the railway company'), with the consent of Marshall

Nicholson the lessor, under the said lease, testified by his signature at the foot hereof, the sum of £1099, being the compensation payable to us under the award of Maurice Deacon, dated June 7, 1898, for the whole of the Middleton Little seam of coal under all that piece or parcel of land situate in the borough of Leeds, and under the Hunslet branch of the railway company, containing by admeasurement three acres or thereabouts . . . . which said coal was required to be left unworked by a notice dated July 16, 1897, under the hand of William Latta, the secretary of the railway company, and addressed to us, the leasehold portion whereof was demised to us for the term of ten years from July 1, 1888, under an indenture of lease dated February 22, 1889, and made between the said Marshall Nicholson of the one part, and us, the Middleton Estate and Colliery Company, Limited, of the other part. And in consideration of the said payment of £1099 we hereby undertake and agree to leave entirely unworked the whole of the said coal except such part thereof as may be necessary for the purpose of driving through the said coal three headways or roads of such a height and width as are usual in working the Middleton Little seam of coal for the purpose of working any other coal belonging to us, and further undertake at the cost of the railway company to do and execute, or procure to be done and executed, all deeds, matters, and things necessary for vesting the same in the railway company whenever thereunto by them required. And we further acknowledge and declare that the said sum includes satisfaction and compensation for all claims which but for these presents we might have maintained, either under the provisions of any statute, or at law or in equity, against the railway company in respect of the said coal.

"Dated this 6th day of December, 1898."

This instrument was duly signed and sealed.

The award mentioned in the instrument in question was made under the following circumstances. The Middleton Estate and Colliery Company, Limited, were the lessees under one Marshall Nicholson of coal underlying certain lands in the borough of Leeds. The Great Northern Railway Company served a notice upon them under s. 78 of the Railways Clauses

1899

GREAT NORTHERN RAILWAY v. INLAND REVENUE COMMISSIONERS.

Consolidation Act, 1845, requiring them to leave certain of the said coal unworked for the protection of the railway company, and stating that the railway company were willing to make compensation therefor. The railway company and the colliery company not agreeing as to the amount of this compensation, the matter was referred to arbitration in pursuance of the Act. The arbitrator awarded the sum of 1099*l.* mentioned in the instrument in question to be paid by the railway company to the colliery company.

The Commissioners of Inland Revenue, being of opinion that the instrument in question constituted a renunciation of a right or interest in the property, assessed ad valorem conveyance on sale duty thereon at the rate of 5*s.* for every 50*l.* upon the sum of 1099*l.*, being the consideration therein mentioned, but at the request of the railway company they stated this case, the questions for the opinion of the Court being—

(1.) Whether the instrument is chargeable with the duty in accordance with the assessment of the commissioners?

(2.) If not, with what duty the instrument is chargeable?

By the schedule to the Stamp Act, 1891, stamp duties are prescribed as follows:—

"Release or renunciation of any property, or of any right or interest in any property—

	s.	*d.*
"Upon a sale, see 'Conveyance on Sale.'		
"By way of security, see 'Mortgage,' &c.		
"In any other case	10	0."

Under the head "Conveyance or Transfer on Sale of any Property," stamp duty is prescribed "where the amount or value of the consideration does not exceed 5*l.* . . . . 6*d.* . . . . For every 50*l.*, and also for any fractional part of 50*l.* of such amount or value . . . . 5*s.*"

C. A. Russell, Q.C., and *Colville*, for the appellants. The ordinary proceedings under s. 78 of the Railways Clauses Consolidation Act, 1845, do not amount to a release or renunciation of any property, or of any right or interest in any property, upon a sale, nor was there anything in the transaction

in question which brought it within these words. The instrument, therefore, ought not to bear an ad valorem stamp. No doubt if it amounted to a release or renunciation it should bear a 10*s.* stamp. There was, however, no sale of the coal by the appellants to the railway company. This is plain from the judgments of Jessel M.R. and Brett L.J. in *Errington* v. *Metropolitan District Ry. Co.* (1), in which the effect of similar transactions under s. 78 was explained. Nor did this particular transaction purport to be a conveyance of the coal to the railway company. At the most, it was a release or renunciation of a right to get the coal, but not upon a sale.

[PHILLIMORE J. Is not the word "renunciation" a Scottish term of art? I do not know it as an English law term in a conveyance.]

That is so. It has a special meaning in Scotland, and the word "release" has a special meaning in England in relation to real property, as in the release of a reversion. The language of the Stamp Act must be construed strictly, and, therefore, this instrument will not fall within the heading "Release or Renunciation" at all.

The Solicitor-General (*Sir R. B. Finlay, Q.C.*), and *Danckwerts*, for the Crown. This transaction is a release of a right to property upon a sale within the meaning of the Stamp Act, and as such must be stamped with an ad valorem duty. The remarks of Jessel M.R. and Brett L.J. in *Errington* v. *Metropolitan District Ry. Co.* (1) as to the effect of s. 78 of the Railways Clauses Act were obiter dicta, and were opposed to the judgment of Lord Cairns L.C. in *Smith* v. *Great Western Ry. Co.* (2) It is plain from what was there said that the effect of such a transaction is that the property in the coal passes to the railway company: *Pountney* v. *Clayton* (3); *Midland Ry. Co.* v. *Miles* (4); *Reg.* v. *London and North Western Ry. Co.* (5); *In re Lord Gerard.* (6) If it is not a sale of the coal, it is a sale of the right of support. The meaning of the expression "conveyance on sale" has been considered in *Foster* v.

(1) (1881) 19 Ch. D. 559.
(2) (1877) 3 App. Cas. 165.
(3) (1883) 11 Q. B. D. 820.
(4) (1885) 30 Ch. D. 634.
(5) [1894] 2 Q. B. 512.
(6) [1895] 1 Q. B. 459.

1899

GREAT NORTHERN RAILWAY v. INLAND REVENUE COMMISSIONERS.

Commissioners of Inland Revenue (1); *Great Western Ry. Co.* v. *Commissioners of Inland Revenue* (2); *Coats* v. *Commissioners of Inland Revenue* (3); and this instrument falls within the principles laid down in those cases. Even if the term "renunciation" is to be taken as a Scottish term of art, this is a "release upon a sale." The word "release" is used in the Stamp Act not in its strict, but in its more popular sense. This instrument is a deed, and must be stamped as such.

C. A. Russell, Q.C., replied.

DARLING J. This case turns upon the exercise of certain powers under s. 6 of the Lands Clauses Act and s. 78 of the Railways Clauses Act. A notice having been given by a certain colliery company, there was a proceeding to see what compensation should be given under those Acts, and an instrument was drawn up, by which it was arranged that, in consideration of the payment of 1099*l.*, the colliery company "hereby undertake and agree to leave entirely unworked the whole of the said coal," that being coal partly under the railway, but to a great extent, also, coal at a distance from the railway, yet such as was properly dealt with by virtue of the sections which I have mentioned. Then the instrument goes on: "And we further acknowledge and declare that the said sum includes satisfaction and compensation for all claims which but for these presents we might have maintained either under the provisions of any statute, or at law or in equity, against the railway company in respect of the said coal." To that instrument the colliery company affixed their seal. The question has arisen, What is the proper revenue stamp to be put upon this instrument? It is stated in the case that, "the commissioners, being of opinion that the instrument constituted a renunciation of a right or interest in the property, assessed ad valorem conveyance on sale duty thereon at the rate of 5*s.* for every 50*l.* upon the sum of 1099*l.*, being the consideration therein mentioned."

Now it is contended on behalf of the Crown that this

(1) [1894] 1 Q. B. 516. (2) [1894] 1 Q. B. 507.
(3) [1897] 2 Q. B. 423.

instrument amounts to a "release or renunciation of any property, or of any right or interest in any property, upon a sale." That is the first point which is taken. I may say that I do not think that this instrument, whatever it be, is a "renunciation." I am inclined to think that the word "renunciation" is used in the Stamp Act because that Act applies both to England and to Scotland, and that the word "renunciation" is used with regard to incidents of the Scottish law.

The question then is, Is this instrument a release upon a sale? I do not think that it is. I do not think that what was done here amounted to a sale. It is true that the colliery company to whom the coal belonged gave up their right to work it; but I do not think that the property in the coal passed to the railway company. For that I think it is sufficient to refer to the words of Jessel M.R. in the case of *Errington* v. *Metropolitan District Ry. Co.* (1) Referring to this very section and to a similar proceeding to that which took place in this case, he says (2): "Then the 78th section provides for cases where they do not purchase, and then the mine owner may work them on giving thirty days' notice, unless the company make compensation. That is not a purchase, and it does not apply to mines which the company may purchase only, but applies to all mines within a certain distance of the railway, whether they are within the limit of the land described or not. It is of much wider application than to the purchase of mines." Brett L.J. in the same case uses these words (3): "That 78th section applies at all times. It not only applies to the working of minerals under the land where the railway company are already owners of the surface of that land, but to the working of minerals in a man's own land near the railway. Under the 78th section, after the compensation has been paid by the railway company, the minerals do not belong to the railway company. They continue to be the property of the landowner. The railway company cannot touch the minerals. If all they have done is to pay the compensation under s. 78,

(1) 19 Ch. D. 559. (2) 19 Ch. D. 569.

(3) 19 Ch. D. 575.

1899

GREAT NORTHERN RAILWAY v. INLAND REVENUE COMMISSIONERS.

Darling J.

they cannot touch them. It is true that the landowner to whom those very minerals belong cannot touch them, and it is because he cannot touch them that compensation is given to him; but the property in them remains in him."

It has been pressed upon us by the Solicitor-General that these are mere obiter dicta, and for that he founds himself upon the case of *Smith* v. *Great Western Ry. Co.* (1) That was a case decided before the case of *Errington* v. *Metropolitan District Ry. Co.* (2), and it was cited in that very case; so that it was present to the minds of the members of the Court who gave the judgments from which I have just quoted. I must say that, giving the best consideration I can to this case of *Smith* v. *Great Western Ry. Co.* (1), I do not think that it conflicts with the words afterwards used by Jessel M.R. and by the late Lord Esher. The strongest portion of the judgment is in the judgment of Lord Cairns, and the Solicitor-General said that he was content to stand upon this. Lord Cairns reads the 6th section of the Lands Clauses Act and the 78th section of the Railways Clauses Act together, and no doubt the 6th section of the Lands Clauses Act deals with purchase. He says (3): "My Lords, it is quite true that reading the two sections in this way there are not, in what I have read, any words of negation prohibiting the persons having the ulterior interest from ever working the mine. But it seems to me that those words are entirely unnecessary. We have a provision that the lessee shall be dealt with and compensated and that he shall not work. We have then a provision that all other persons shall be compensated according to their interests, and the inevitable conclusion from that is that those other persons who are so compensated, or who may be so compensated, shall not work any more than the lessee might work. It would be a matter of astonishment if any court of equity could hesitate, if that be the construction of the Act, in prohibiting those other persons, who either are to be, or may be, thus compensated, from working, just as they would prohibit the lessee himself."

(1) 3 App. Cas. 165. (2) 19 Ch. D. 559.
(3) 3 App. Cas. 181.

Now, the Solicitor-General's construction of what Lord Cairns said is that it is in conflict with what was said by Jessel M.R. and Lord Esher in the later case, and he contends that Lord Cairns meant that the property passed from the colliery company to the railway company. I do not find that Lord Cairns says anything of the kind. I think, in fact, that what he says shews that he did not mean anything of the kind. When he uses the words "It would be a matter of astonishment if any court of equity could hesitate, if that be the construction of the Act, in prohibiting those other persons, who either are to be, or may be, thus compensated, from working, just as they would prohibit the lessee himself," I cannot suppose that he would use an illustration of that kind if he thought that the property passed. He would have said in plain words that the property had passed to the railway company. Therefore, I think that the decisions in the case of *Errington* v. *Metropolitan District Ry. Co.* (1) are binding upon us.

The next contention of the Solicitor-General is that, if this transaction was not a sale of the coal, it was a sale of a right to support. He says it was a release upon a sale of a right in property within the meaning of the Stamp Act. Now, I do not think that that is a good argument either. I do not think it is proper or apt language to use to speak of the sale of a right of support. What a sale exactly is it is not necessary for me to attempt to define, but I am content to rely upon a passage in the judgment of Lindley L.J. in the case of *John Foster & Sons* v. *Commissioners of Inland Revenue* (2), where he says: "I do not know what is necessary to constitute a sale except a transfer of property from one person to another for money or, for purposes of the Stamp Act, for stock or marketable securities." Well, all that a sale may be I do not profess to know, but I do not think there is such a thing as the sale of a right to have land supported by the coal underneath it, so as to bring this case within the words, "Release or renunciation of any property, or of any right or interest in any property, upon a sale."

It is contended that at any rate this transaction was a release

(1) 19 Ch. D. 559. (2) [1894] 1 Q. B. 516, at p. 528.

1899

GREAT NORTHERN RAILWAY v. INLAND REVENUE COMMISSIONERS.

Darling J.

of a right or interest in property. It has been argued against that, that the word "release" is used in the Stamp Act in a highly technical sense and as an absolute term of art, like the word "renunciation." I think, as I have said before, that the word "renunciation" is a Scottish term of art. But it is said that "release" is here meant to be simply an English term of art, and that it is the kind of release which is dealt with when you speak of "lease and release"—that it is the kind of release of a right spoken of in the Termes de la Ley: "Also in a release of right it is needful that he to whom the release is made have a freehold or a possession in the lands in deed or in law, or a reversion at the time of the release made, for if he have nothing in the land at the time of the release made the release shall not be to him available." Of course, if the word "release" were used in that sense, this is not a "release," because the railway company, when this document was made, had no interest in the coal. But I do not think these words in the Stamp Act are always used in a nice artistic sense. I think they have a wider, and perhaps a looser, meaning. I agree with the Solicitor-General that some of these words are used to sweep into the net of the Exchequer something which would very likely escape if words were used in their very strict but limited legal meaning, and I think that the word "release" is used here in that sense. Now, what was done in this document, I think, amounted to the release of a right or interest in property; but I do not think it amounted to the release of a right or interest in property on a sale. Therefore, I think it comes within the words "release of" a "right or interest" in property "in any other case"; and, that being so, I think that this document should bear the 10*s.* stamp.

There was a point that was argued before us—that this was a deed. I do not think it is necessary to decide that point: if it were a deed it would still require a 10*s.* stamp, and therefore I do not affect to decide whether this is, or is not, a deed.

PHILLIMORE J. I am of the same opinion. The commissioners assessed duty upon this instrument as upon a renunciation on a sale. I start with the word "renunciation," and

I ask myself, Is there any such instrument known to the English law—any such conveyancing instrument—as a renunciation on sale? And I answer, No. The word "renunciation," as applied to transactions, is known in England. The word "renunciation," as applied to instruments, is, as far as I can gather, and as far as counsel for the Crown can help us, only applied to two instruments—one is a renunciation upon a letter of allotment, and that is specifically dealt with in the schedule of the Stamp Act; the other is a renunciation of probate by an executor, which, we are told, has been decided not to come under this portion of the schedule. The word "renunciation" is, however, a term well known in Scottish law, and applied in Scottish law to at least three classes of cases: a renunciation by an heir, which is not unlike the renunciation by an executor in England, but is not the same; a renunciation by a lessee of his lease, which is equivalent to a surrender; and a renunciation by the mortgagee or incumbrancer of certain heritable rights which he has acquired by way of mortgage, or hypothecation, or pledge; and in that sense Bell's Law Dictionary and Paterson's Compendium of English and Scotch Law, which is a well-known and useful book, treat it as a translation of the English word "reconveyance," and possibly in some cases of the English word "release." So here, in this Stamp Act, it is treated under the title "Mortgage," and again under the title "Reconveyance," as an equivalent for "reconveyance." It is evidently, therefore, an equivalent in Scottish law and language for the words "reconveyance," and (in some cases) "release" in English law and language. I think it is very important that we should not allow words which are used as Scottish terms of art to be imported loosely into English transactions with a view to imposing a tax. I bear in mind what Wills J. said in *Coats* v. *Commissioners of Inland Revenue* (1) on the word "excambion": "The term 'excambion' seems to be a term known to Scottish law, and it appears there to be applied to heritable property and to heritable property only. Of course, etymologically, it means nothing more than exchange, but it may very well be that in the law of Scotland it has got

(1) [1897] 1 Q. B. 778, at p. 784.

1899

GREAT NORTHERN RAILWAY v. INLAND REVENUE COMMISSIONERS.

Phillimore J.

a definite meaning. I cannot, however, for a moment imagine that it was introduced into the Stamp Act for any other purpose than to hit Scottish instruments that went by such a name, because long before the Act of 55 Geo. 3 'excambion,' whatever it might have been at the time when Sheppard's Touchstone was written, had ceased to be a term of English law, or known to English law except as a matter of antiquarian history." I decline, therefore, to consider this instrument as a renunciation upon a sale. It may, however, be a release upon a sale. In that case the commissioners have used the wrong word, and have given us a good deal of trouble in the course of this case; but nevertheless the duty would remain the same.

Then follows the question—Is this "upon a sale"? With regard to that, I desire thoroughly to adopt the language and reasoning of my learned brother. I think that the decision of the Court of Appeal in *Errington's Case* (1) is clearly that this is not a sale. I think the decision of the House of Lords in *Smith* v. *Great Western Ry. Co.* (2) points the same way, and was so construed by the learned judges in the Court of Appeal in *Errington's Case* (1), and I may add that, unaided by such judgments, if I had had to decide the case for the first time, I should have come to the same conclusion. The coal here is not sold; the railway company cannot work it; the railway company, if they worked it, would be trespassers; and, if they wanted to work it, they must give more money to the owners of the mines before they could do so.

Then it is said that this is a sale of a right of support. I doubt whether such an easement can be sold—at any rate, it is not sold here. That is not the nature of the transaction. It may amount in substance to this—that the railway company secures the right of support; but it is not the sale of a right of support. It is a statutory process by which the railway company—which fears that its railway may be interfered with—secures in invitum against the mine owner the right to have the coal, not only that necessary for support, but that which may possibly be necessary for support, left untouched. Therefore, this, which is certainly not a "renunciation," is also not

(1) 19 Ch. D. 559. (2) 3 App. Cas. 165.

a release upon a sale. I think it very important to get rid of the word "renunciation," because that is a word one does not understand. When one comes to get the word "release," which one does understand, one sees clearly that it is not a release upon a sale.

Then, is it a release of a right in property not otherwise charged? Well, I do not know that it was necessary for the security of the railway company that this instrument should be as full or have all the clauses in it that it has. I dare say that the railway company might have been quite protected if they had simply taken a receipt and left out some portion of this instrument; just in the same way that many a trustee would be amply protected by a receipt from his cestui que trust for the money he pays over; but very often the greater security is taken in order to avoid possible claims and doubts which might possibly arise. If, however, for greater security they have made this a "release," they must pay the proper duty upon it. I think this is a "release"—I think those words, "we further acknowledge and declare that the said sum includes satisfaction and compensation for all claims which but for these presents we might have maintained," are words of release. The word "release" is not necessary in a release. The word may be "renounce," "remit claim," "make quit," or, in the olden times, it might have been the corresponding Latin word: therefore, I think this is a "release." The only thing I have had any doubt about is whether it is a release of a right to property; but upon the whole I think it is. It "includes satisfaction and compensation for all claims which but for these presents we might have maintained" in respect of the coal. I think it is a release of a right of some proprietary interest in the coal—the right, for instance, to protect the coal, and to work the coal, which is, I suppose, the proprietors' right; and, therefore, I think that upon the whole this may be properly construed as the release of a right, or rather, I should say, of an interest in property, not upon a sale, nor upon a mortgage.

That makes it unnecessary to decide the question, which I should like to have further assistance before deciding, as to whether this is or is not a deed. Of course, if it is a deed not

1899

GREAT NORTHERN RAILWAY v. INLAND REVENUE COMMISSIONERS.

otherwise charged, to use the language of the old Stamp Acts (the modern language is a little different—"a deed of any kind whatsoever not described in the schedule"), it would bear precisely the same stamp. Therefore I agree with my learned brother that the proper stamp upon this instrument is the stamp of 10*s*.

Judgment accordingly.

Solicitor for appellants: *R. Hill Dawe.*
Solicitor for respondents: *The Solicitor of Inland Revenue.*

A. P. P. K.

1899
Oct. 25, 26.

THE UCKFIELD RURAL DISTRICT COUNCIL, APPELLANTS; THE CROWBOROUGH DISTRICT WATER COMPANY, RESPONDENTS.

Local Government—By-laws—Buildings—Water Tower—Effect of Public Health Acts on subsequent Special Water Company's Act—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 93—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 157—60 & 61 *Vict. c. cxvii.* (*Local*).

Sect. 93 of the Waterworks Clauses Act, 1847, provides that nothing therein or in the special Act contained shall be deemed to exempt the undertakers "from any Act for improving the sanitary condition of towns and populous places which may be passed in the same session of Parliament in which the special Act is passed, or any future session of Parliament." A water company by their special Act, passed in 1897 and incorporating the Waterworks Clauses Act, 1847, were empowered to erect and maintain a water tower in a specified place. Shortly after the special Act came into force the local sanitary authority of the district, under the powers given by s. 157 of the Public Health Act, 1875, made by-laws providing that any person intending to erect a building should give the local authority notice of his intention and of the date on which the building was to be commenced, and deliver to them plans and sections of it, and a description of the materials with which it was to be constructed. The special Act did not incorporate the Public Health Act, 1875, but contained no provisions inconsistent with s. 157 of that Act or with the by-laws:—

Held, with respect to the erection of the water tower authorized by the special Act, that s. 93 of the Waterworks Clauses Act, 1847, had not the effect of exempting the water company from the provisions of the Public Health Act, 1875, and that they were bound to comply with the by-laws made by the local sanitary authority under that Act.

CASE stated by four justices of the county of Sussex.

At a court of petty sessions, held for the division of Trant in

the same county, two informations were preferred on behalf of the appellants, by their surveyor, against the respondents.

The first of these informations charged that the respondents in October, 1898, did begin to erect a certain building—to wit, a water tower—without giving the appellants' clerk or surveyor notice of the respondents' intention so to do, and without delivering to the clerk or surveyor complete plans and sections of the building as required by the by-laws in such case made and provided.

The second information charged that the respondents in October, 1898, began to erect the same building without previously delivering or sending to the appellants' surveyor notice in writing specifying the date on which the respondents would begin to erect the building as required by the by-laws in such case made and provided.

On the hearing of these informations the following facts were proved or admitted before the justices :—

The appellants were the rural district council for the district of Uckfield, in the county of Sussex, of which district the parish of Crowborough forms part.

Acting under the powers conferred upon them in that behalf by s. 157 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), the appellants duly made certain by-laws, which were duly allowed and confirmed by the Local Government Board on January 15, 1897, and then published by the appellants.

By-law 93 of these by-laws provides (inter alia) that any person who shall intend to erect a building shall give to the appellants notice in writing of such intention in manner therein mentioned, and shall also deliver or send, or cause to be delivered or sent, to their clerk or surveyor such plans and sections as are therein more particularly described, and also a description in writing of the materials of which it is intended that the building shall be constructed and of the intended mode of drainage and means of water supply.

By-law 94 provides (inter alia) that every person who intends to lay out or construct a street, or to erect a building, or otherwise to execute any work to which any of the by-laws relating to new streets and buildings shall apply, shall before

1899

UCKFIELD RURAL COUNCIL v. CROWBOROUGH DISTRICT WATER COMPANY.

beginning to lay out or construct such street, or to erect such building, or to execute such work, deliver or send, or cause to be delivered or sent, to the surveyor of the council at his or their office, notice in writing in which shall be specified the date on which such person will begin to lay out or construct such street, or to erect such building, or to execute such work.

By-law 99 prescribes certain penalties for the breach of the foregoing by-laws, and by-law 100 contains provisions for the removal, alteration, or pulling down of work executed in contravention of the by-laws.

The respondents are the Crowborough District Water Company, incorporated by the Crowborough District Water Act, 1897 (60 & 61 Vict. c. cxvii) (Local), which received the Royal assent on July 15, 1897.

Sect. 25 of that Act provides: "Subject to the provisions of this Act the company may make and maintain in the lines and situations and according to the levels shewn on the deposited plans and sections the waterworks hereinafter described with all proper and necessary embankments filtering-beds drains sluices catch-pits conduits culverts channels wells cuts adits roads approaches telegraphs telephones and other means of electrical communication standpipes and hydraulic rams for high-level service and other apparatus engines works and conveniences connected with the said works or any of them or incidental thereto or necessary or convenient for inspecting maintaining cleansing repairing conducting or managing the same and may enter and take and use such of the lands delineated on the deposited plans and described in the deposited book of reference as may be required for that purpose.

"The waterworks . . . authorized by this Act are:— . . . (8) a high-service water tower situate in the field or inclosure No. 1117 on the Ordnance Map (edition of 1888) of the said parish . . . ."

The respondents, purporting to act under the powers of this special Act, proceeded to construct at Crowborough the works mentioned in s. 25, and in particular in October, 1898, commenced to construct the water tower mentioned in sub-s. 8;

but they did not in any way comply with the requirements of the by-laws, 93 and 94, of the district council.

The justice dismissed both informations, being of opinion that the by-laws did not apply to the building of the water tower, and that the appellants had no power in law to enforce the requirements of their by-laws as against the respondents in respect of the construction of the works authorized by s. 25 of the respondents' special Act.

The question for the opinion of the Court was, whether the justices were right in so holding, and in dismissing the informations.

H. E. Moore (*Lampard* with him), for the appellants. The justices ought to have convicted the respondents, who are subject to and bound by the by-laws made by the district council under the Public Health Act, 1875. That Act and the water company's special Act must be read together. A prior Act is not repealed by a subsequent Act unless, in the language of Grove J. in *Hill* v. *Hall* (1), there is "a necessary and irreconcilable inconsistency between the scope and language of the two Acts." There is no such inconsistency here. Sect. 25 of the special Act provides that the company may take and use certain specified lands for the purpose of executing the authorized works with proper and necessary adjuncts, and specifies the particular place in which the water tower may be built; it contains no direction whatsoever with respect to the matters dealt with by the district council's by-laws. The water company are subject to the general law of the Public Health Act, 1875, in the same way as are other owners or occupiers of land.

The water tower is clearly a "building" to which the by-laws in question apply.

Whateley, for the respondents. The by-laws were made after the special Act came into force. There was no power to make or enforce them so far as the water company were concerned, because the provisions of the special Act override

(1) (1876) 45 L. J. (M.C.) 153.

1899

UCKFIELD RURAL COUNCIL v. CROWBOROUGH DISTRICT WATER COMPANY.

the provisions of the prior general Act of 1875 under which the by-laws are made. The Public Health Act, 1875, is not incorporated with the special Act, and where there is no incorporation a general sanitary Act cannot affect the provisions of a subsequent Act giving special statutory powers. In *Hill* v. *Hall* (1) the two Acts were incorporated. Primâ facie a special Act is not affected by general legislation, and where there is an inconsistency between the provisions of two Acts of Parliament the later Act must prevail: *London and Blackwall Ry. Co.* v. *Limehouse Board of Works* (2), judgment of Wood V.-C.; *City and South London Ry. Co.* v. *London County Council.* (3) There is an inconsistency here between the special Act and the Public Health Act, 1875. By the special Act the Legislature has vested in the water company the discretion to determine how the water tower is to be constructed, and that discretion is inconsistent with the powers of control which the district council seek to exercise. Sect. 93 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), provides that "nothing herein or in the special Act contained shall be deemed to exempt the undertakers from any general Act relating to waterworks, or any Act for improving the sanitary condition of towns and populous districts which may be passed in the same session of Parliament in which the special Act is passed, or any future session of Parliament." That provision implies that the undertakers are exempt from the provisions of any public sanitary Acts passed before the same session of Parliament in which the special Act is passed. "Or any future session of Parliament" means future to the passing of the special Act. The water company, therefore, under this special Act, passed in 1897, are exempted from the provisions of the Public Health Act, 1875. Secondly, the water tower is not a "building" within the meaning of the by-laws in question. The power to make by-laws with respect to new buildings is given by s. 157 of the Public Health Act, 1875. That section applies to public and domestic buildings which require regulations as to

(1) 45 L. J. (M.C.) 153. (2) (1856) 26 L. J. (Ch.) 164.
(3) [1891] 2 Q. B. 513.

sewerage and drainage, ventilation, &c. This water tower is not adapted for habitation, and none of the purposes for which by-laws can be made under s. 157 apply to it.

H. E. Moore was not heard in reply.

RIDLEY J. The question raised in this case is of some interest. Although I can quite understand that when before the justices the matter, not being perhaps so fully discussed, seemed doubtful, I have arrived at the conclusion that their decision was wrong. The Crowborough Water Company were incorporated by their special Act passed in 1897. Sect 25 of that Act gave them power to "make and maintain in the lines and situations and according to the levels shewn on the deposited plans and sections" the works therein specifically mentioned, and those works included a water tower to be put up in a particular field. They accordingly proceeded to put up a water tower in that field. The question for our determination is whether they were entitled to do it without submitting plans and sections to the district council, and giving the council notice before beginning the work, in accordance with by-laws 93 and 94 made by the district council under the Public Health Act, 1875. I am of opinion that the water company were not so entitled. It was contended on their behalf that when once they had authority, under their special Act, to put up the tower they might put it up as they chose. I cannot accept that view. The precise effect of the special Act is to give them power to put up in another person's field a water tower—that is, they had power to put up the tower in that field as though the land was their own. They required a statutory power in order to enable them to take and use the land. When they had got as far as that they were, in my opinion, in no better position than the private owner who, along with them and all others, must, unless specially exempted by some statutory provision, comply with the provisions of the Public Health Act, 1875, under which Act the local authority may make by-laws with respect to the commencement and construction of new buildings. It was contended for the respondents that they were not bound by the by-laws, and

1899

UCKFIELD RURAL COUNCIL v. CROWBOROUGH DISTRICT WATER COMPANY.

Ridley J.

that the Public Health Act, 1875, did not apply to them because it was not incorporated with their special Act. It was said that it must be incorporated in order to bind the water company, and that their powers under the special Act were given to them independently and free from the control of the general law. It is usual, no doubt, in special Acts to incorporate the powers of a general Act dealing with the same subject. In special railway Acts the powers of the Railways Clauses Consolidation Acts are incorporated, and in special waterworks Acts the powers of the Waterworks Clauses Acts are incorporated. It is a brief and expeditious method of enactment by which those general powers which are intended to be given to all companies are given to each company as it comes into existence. But it does not follow that, because the Public Health Act, 1875, is not incorporated with the special Act, the water company are not bound, like everybody else, by the provisions of the earlier Act. If the directors of the water company were, in putting up their water tower, to commit a breach of the criminal law, it could not be contended that the criminal law did not apply to them; yet the argument put forward on their behalf must mean that no Act of Parliament bears upon them at all unless specially mentioned in their special Act. The real question is whether, under s. 93 of the Waterworks Clauses Act, 1847, the water company are protected against the provisions of the Public Health Act, 1875, or are subject to those provisions. I am of opinion that the water company are not exempted from those provisions. Sect. 93 provides that "nothing herein or in the special Act contained shall be deemed to exempt the undertakers from any general Act relating to waterworks, or any Act for improving the sanitary condition of towns and populous districts which may be passed in the same session of Parliament in which the special Act is passed, or any future session of Parliament." I think that that provision is intended to deal with legislation future to the special Act. It means to say, not with regard to existing law at the time the special Act is passed, but with regard to future Acts which may be passed in the same session of Parliament as the special Act, or any future session of

Parliament, that the provisions of those Acts are to apply. But the section is silent as to Acts of Parliament existing when the special Act is passed. There is nothing in it which applies to the Public Health Act, 1875. There is nothing in it which is inconsistent with the view that the Public Health Act, 1875, applies to a water company constituted under a subsequent special Act in the same way as it applies to all others. In my opinion s. 93, whilst it deals with all legislation future to the special Act, leaves untouched legislation existing when the special Act is passed. It leaves the beneficiaries under the special Act still subject to the general law of the land. If that be so, I cannot see anything in s. 93 to exclude the water company here from being subject to the provisions of the Public Health Act, 1875. It was urged, further, that the provisions of the special Act were inconsistent with those of the Public Health Act, 1875, and therefore that the special Act ought to prevail. Two cases—*London and Blackwall Ry. Co.* v. *Limehouse Board of Works* (1) and *City and South London Ry. Co.* v. *London County Council* (2)—were relied on in support of this contention. I think that both those cases are distinguishable. The principle laid down in them comes to this: that if there is an inconsistency between a special Act and a general Act the provisions of the special Act are not overridden by those of the general Act. In the first of those two cases Wood V.-C. pointed out that special powers were given to the railway company under their special Act, which was passed before the general Act. He came to the conclusion, in effect, that the special powers given by the railway company's Act were not so inconsistent with the general powers given by the subsequent Act that the subsequent Act must be taken to have overridden the special Act. The case of *City and South London Ry. Co.* v. *London County Council* (2) is no stronger in support of the contention made for the respondents. There power was given to the railway, under a special Act passed subsequently to the general Act, to use particular land for the purpose of making a railway under a street, and a station was necessary for the purposes of the railway. The

(1) 26 L. J. (Ch.) 164. (2) [1891] 2 Q. B. 513.

1899

UCKFIELD RURAL COUNCIL v. CROWBOROUGH DISTRICT WATER COMPANY.

Ridley J.

general Act, under which the county council acted, provided that no building should, without their consent, project beyond the general line of buildings in any street. Part of the railway company's station did project beyond the general line of buildings in the street. The Court of Appeal held that the powers given by the special Act were inconsistent with those given by the general Act, and on that ground they held that the county council could not interfere with the building. I think it is clear that but for that inconsistency the decision would have been otherwise. There is no such inconsistency in the present case. The power given to the water company is to put up a water tower in a particular field—nothing more. If the district council had required that it should be put up in another field they would have required something inconsistent with the power given to the water company by their special Act. What the county council did in fact require did not affect the powers of the water company under their special Act.

On the second point taken for the respondents I need say very little. It is enough to say that the water tower is a building—a permanent erection—and, therefore, that the by-laws made by the district council apply to it.

For these reasons I am of opinion that the water company should have supplied plans and have given notice as required by the by-laws. The case must go back to the justices with a direction to convict.

DARLING J. I am of the same opinion.

Judgment for the appellants.

Solicitors for appellants: *Lewis & Holman, Lewes.*
Solicitors for respondents: *Verrall & Borlase, Brighton.*

W. A.

LANE, Appellant *v.* RENDALL, Respondent.

1899
Oct. 27.

Weights and Measures—Weighing Machine—Weight indicated exceeding Weight of Article sold—"False or Unjust"—Weights and Measures Act, 1878 (41 & 42 *Vict. c.* 49), *s.* 25.

The respondent was charged under s. 25 of the Weights and Measures Act, 1878, with having in his possession for use for trade a weighing machine which was false or unjust. The machine, which was used for weighing tea, had on it, under the scoop in which the tea was placed, a piece of paper, the effect of which was to make the machine indicate a weight exceeding, by the weight of the paper, the weight of the tea in the scoop. The paper was placed where it was for the purpose of convenience and expedition in weighing, because it would take longer to weigh the tea if it were placed in the bag in which it was to be sold before being put into the scoop. The paper weighed less than the bag in which the tea was sold.

On a case stated:—

Held, that, as the machine, when used with the paper, indicated a weight in excess of the true weight of the tea sold, it was "false or unjust," within the meaning of s. 25, and the respondent ought to be convicted.

Case stated by justices.

On March 3, 1899, the respondent appeared to answer an information, laid by the appellant, charging that the respondent, on January 6, 1899, did, at 276, Battersea Park Road, unlawfully have in his possession for use for trade one weighing machine, which was false or unjust, contrary to s. 25 of the Weights and Measures Act, 1878. (1)

The appellant was an inspector of weights and measures for the county of London, and the respondent was carrying on business, under the firm of Melrose & Co., as a tea merchant, at, amongst other places, No. 276, Battersea Park Road.

On January 6, 1899, the appellant went to the respondent's

(1) 41 & 42 Vict. c. 49, s. 25: "Every person who uses, or has in his possession for use for trade, any weight, measure, scale, balance, steelyard, or weighing machine, which is false or unjust, shall be liable to a fine not exceeding 5*l.*, or in the case of a second offence 10*l.*, and any contract, bargain, sale, or dealing, made by the same shall be void, and the weight, measure, scale, balance, or steelyard, shall be liable to be forfeited."

1899

LANE v. RENDALL.

shop at No. 276, Battersea Park Road, and found there a weighing machine, which the respondent had in his possession for use for trade.

When the weighing machine was so found by the appellant there was a piece of paper underneath the scoop in which the tea or other article to be weighed was placed, and between the bottom of the scoop and the cross-bar or cup in which the scoop rested.

The effect of the piece of paper upon the weighing machine was to make it indicate weights 1½ drachms—the weight of the paper—in excess of the actual weight of the article in the scoop. In the absence of the piece of paper the weighing machine would have shewn the actual weight of the article in the scoop.

At the time when the weighing machine was found with the piece of paper so placed as aforesaid the respondent's servants were engaged in using the same for the purpose of weighing out tea to be made up into packets. The piece of paper had been placed by the respondent's manager under the scoop, instead of in the scale, in accordance with his usual practice, to facilitate and quicken the process of weighing the tea, and so causing the customer to assist in defraying the cost of the paper bag or wrapper in which the tea was sold. The respondent's servants made up on Fridays as many as 3000 ¼-lb. packets of tea, and it would take them much longer to weigh out the tea for the packets, if the tea were in each case first placed in the paper bag in which it was to be sold, and then put into the scoop, because any adjustment of the tea to the intended quantity would then have to be made by adding to or taking from the tea in the bag. The piece of paper only weighed about half as much as the paper bag in which the tea was sold, so that in the case of ¼-lb. packets each packet weighed more than 4 oz., and contained within 1½ drachms of 4 oz. of tea.

It was contended for the appellant that the weighing machine, in the condition in which he found it, was false or unjust, inasmuch as it did not correctly indicate the actual weight of the tea in the scoop.

It was contended for the respondent, (1.) that the weighing machine was not in itself unjust; (2.) that in *Harris* v. *Allwood* (1) the legality of a custom of the trade to weigh paper with the tea had been established in the High Court of Justice, and (3.) that the proceeding ought to have been taken, if at all, under s. 26 of the Weights and Measures Act, 1878, and not under s. 25.

The justices were of opinion that the weighing machine, being per se true and just, could not be rendered untrue or unjust by merely using the piece of paper with it in the manner above described, and they therefore decided to dismiss the information, subject to this case.

The question of law for the opinion of the Court was, whether, upon the facts above stated, the justices were right in dismissing the information.

George Elliott, for the respondent. There is a preliminary objection to the hearing of this case. By rule 18 of the Rules of 1886, made under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), the application to state a case is to be made within seven clear days from the date of the proceeding to be questioned, and the case is to be stated within three calendar months after the date of the application. Here the hearing was on March 3, and therefore the application had to be made not later than March 10, and the case should have been stated not later than June 10, but it was not stated until June 14. Rule 18 not having been complied with, there is no jurisdiction to hear the case, for the rule is imperative: *Lockhart* v. *St. Albans Corporation*. (2)

[RIDLEY J. That is so only as relates to acts to be done by the appellant; but as to the act of the justices the rule is only directory: *Hughes* v. *Wavertree Local Board*. (3) We must hear the case.]

Daldy (*Avory* with him), for the appellant. The weighing machine, as it was used by the respondent, was false or unjust,

(1) (1892) 57 J. P. 7; S.C. nom. *Allwood* v. *Harris*, 9 Times Rep. 14.

(2) (1888) 21 Q. B. D. 188.

(3) (1894) 10 Times Rep. 357; 58 J. P. 654.

1899

LANE v. RENDALL.

within the meaning of the Weights and Measures Act, 1878, because, as used, it did not correctly indicate the weight of the tea sold. *Harris* v. *Allwood* (1), which was relied upon in the Court below, is no authority for the respondent, because there the charge was under s. 26, which deals with cases of fraud. Here no fraud is suggested, but the respondent is liable under s. 25. *Great Western Ry. Co.* v. *Bailie* (2) is in favour of the appellant's contention.

George Elliott, for the respondent. There was nothing wrong in the weighing machine itself, and therefore s. 25 does not apply. The custom of including the weight of the paper is legitimate, as shewn by *Harris* v. *Allwood*. (1) The only way in which the respondent could have been made liable would have been under s. 26, and to make him liable under that section proof of fraud would be required. [He also referred to *Carr* v. *Stringer*. (3)]

Daldy was not heard in reply.

RIDLEY J. The charge against the respondent in this case is not under s. 26 of the statute, and therefore our decision does not involve any suggestion of fraud on his part. The finding of the justices, as I understand it, amounts to a finding of fact that the practice complained of by the information was not adopted in order to defraud customers. But the question to be decided is, whether the respondent was not in fact guilty, under s. 25, of the offence of having in his possession for use for trade, a weighing machine which was false or unjust. The facts on which the inspector relied in support of the charge were, that the effect of the piece of paper upon the weighing machine was, to make it indicate a weight in excess of the weight of the article in the scoop. The paper was placed under the scoop to facilitate and quicken the process of weighing the tea. This fact, being found in the case, exonerates the respondent from any suggestion of fraud. But it is also found in the case that this weighing machine, as used, had a piece of paper on it, which added to the weight. This comes to the

(1) 57 J. P. 7; S.C. nom. *Allwood* v. *Harris*, 9 Times Rep. 14.

(2) (1864) 5 B. & S. 928.

(3) (1868) L. R. 3 Q. B. 433.

same thing as if it were a bit of lead attached to the scale so as to increase the weight, for in either of these cases the balance as used is unjust. It does not matter whether the piece of paper is affixed to the weighing machine or is only put on it for habitual use, for it was so used as to alter the weight, and therefore the weighing machine was an unjust weighing machine, as used. It is true that if the piece of paper were taken away the weighing machine would be just, for it would then shew the actual weight of the article; but that is no argument in support of the proposition that it was a just weighing machine when used with the piece of paper on it. I am therefore of opinion that this is a case of using a weighing machine, which was false or unjust, within the meaning of s. 25, because it was false or unjust as used. Mr. Elliott contended that a custom was made out which entitled a tea-dealer to sell, as a pound of tea, a pound in weight made up of tea and paper. I entirely disagree as to the existence of any such custom. If a person buys a pound of tea he is entitled to have a pound of tea, not a pound of tea and paper. But even if tea-dealers are in the habit of including the weight of the bag in the weight sold, and people sometimes acquiesce in the practice for the sake of convenience, that could not justify the use of this weighing machine as the respondent used it. It is the use of a weighing machine which is not true, but false, and therefore the decision of the justices dismissing the information was wrong, and the case must be remitted to them with the intimation of our opinion that they ought to convict the respondent.

DARLING J. I am of the same opinion. It is clear that what has happened is this. The respondent, a tea-dealer, has been in the habit of selling tea, and using the paper when weighing it, in order, as stated in the case, to facilitate and quicken the process of weighing the tea. The result is that, if the piece of paper were removed, the weighing machine containing the tea would not be evenly balanced, though the counterpoise were exactly the weight of the tea in the scale; therefore, so long as the piece of paper is there this is not a

1899

LANE v. RENDALL.

Darling J.

true but an unjust weighing machine. The case states that in the absence of the piece of paper the weighing machine would have shewn the actual weight of the article in the scoop; this amounts to a statement that in the presence of the piece of paper the weighing machine did not shew the correct weight. It is said that the weighing machine is used only for weighing tea, and that there is a custom to weigh paper with tea, but I cannot see anything to support this contention. So long as the paper is in position this machine is not a balance. It is, therefore, not a just but a false weighing machine, and it remains false whatever is weighed in it. I agree that the case must be remitted to the justices, because the respondent ought to have been convicted.

Appeal allowed.
Case remitted.

Solicitor for appellant: *W. A. Blaxland.*
Solicitor for respondent: *H. R. Jones, Wandsworth.*

P. B. H.

SHARMAN *v.* MASON.

1899
Oct. 27, 28;
Nov. 2.

Bankruptcy—Order and Disposition—Reputed Ownership—Goods used by Bankrupt "in his Trade or Business"—Stands used to shew off Goods in Shop—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44 (iii.).

In order to establish that goods were, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt "in his trade or business," within the meaning of s. 44 (iii.) of the Bankruptcy Act, 1883, it is not necessary to shew that the goods were such as the bankrupt could sell or pledge in the course of his business; it is enough to shew that they were in his possession, order, or disposition for the purposes of, or purposes connected with, his trade or business.

In an action to recover possession of stands used in the business of a mantle-maker for the purpose of shewing off to advantage the mantles in her shop, it was proved that the stands were in her possession with the consent of the plaintiff, who was the true owner of them; that the mantle-maker subsequently became bankrupt, and that the defendant, her trustee in bankruptcy, had thereupon removed them from her shop:—

Held, that there was evidence for the jury that the stands were goods "in the possession, order, or disposition of the bankrupt, in her trade or business, by the consent and permission of the true owner, under such circumstances that she was the reputed owner thereof" within the meaning of s. 44 (iii.) of the Bankruptcy Act, 1883.

Appeal from the Mayor's Court.

The following statement of facts is taken from the judgment of Ridley J. (1):—The action was brought to recover possession of thirty-two stands, used in the business of a mantle-dealer to shew off the dresses to advantage, or damages for their conversion. These stands were the property of the plaintiff, who had lent them to his brother to enable him to set up in business as a mantle-maker at 57, Newington Causeway. The brother afterwards, in or about January, 1896, sold his business to a Mrs. Wright, a mantle-dealer, who traded under the name of Roberts & Co., he himself becoming manager of the business so sold. In January, 1898, Mrs. Wright was adjudicated a bankrupt, and the defendant, the trustee in bankruptcy, took away the stands, and removed them to 113, Newington Causeway. The plaintiff then demanded the goods, and a correspondence

(1) Post, p. 683.

1899

SHARMAN v. MASON.

ensued between the solicitors to the parties, the defendant offering to return certain stands, which the plaintiff denied were the stands removed. This action was then brought to recover the stands removed or damages for their wrongful detention. The plaintiff, in his evidence before the recorder in the Mayor's Court, said that he knew Mrs. Wright was using these stands in her business as Roberts & Co. The defendant pleaded s. 44 of the Bankruptcy Act, 1883 (1), and that the stands were in the order and disposition of the bankrupt so that she was the reputed owner of them, and that, therefore, the defendant as trustee was justified in taking them. The learned recorder left the question to the jury whether these stands were "in the possession, order, or disposition of the bankrupt, in her trade or business, by the consent and permission of the true owner, under such circumstances that she was the reputed owner thereof." The jury answered in the affirmative, and the learned judge accordingly gave judgment for the defendant. The plaintiff appealed.

Jelf, Q.C. (*J. Cranstoun* with him), for the appellant. The stands in question were not, on the facts proved at the trial, within s. 44 (iii.) of the Bankruptcy Act, 1883. It is a question of fact whether goods were "in the possession, order, or disposition" of the bankrupt, but it is a question of law whether they were so "in his trade or business." The verdict of the jury does not affect the question, if the facts shew that the plaintiff's goods were altogether outside the scope and principle of s. 44, sub-s. 3. The goods, in order to come within the clause, must be in the bankrupt's possession, order, or disposition "in his trade or business," not merely "being a trader," which were the words in s. 15 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71). The difference is pointed out in *In re Jenkinson*,

(1) The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (iii.): "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, ... shall comprise the following particulars:—

"(iii.) All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof: . . . ."

Ex parte Nottingham and Nottinghamshire Bank. (1) They must be goods which, in the course of his business, he would or might sell or pledge: *Colonial Bank* v. *Whinney.* (2) Lord Watson (3) said: "The principle which appears to me to be deducible from the authorities is this: that goods belonging to a third party are not within s. 44 (iii.) of the Bankruptcy Act, 1883, unless they were left with the bankrupt in such circumstances that, as reputed owner, he could have sold them, or otherwise obtained credit upon them, in the course of his trade or business." The test is not whether a customer coming into the shop might think it was safe to give credit to the mantle-maker because he saw the stands there. Lord FitzGerald in *Colonial Bank* v. *Whinney* (4) refers to *Ryall* v. *Rowles* (5) and the observations of Lord Redesdale in *Joy* v. *Campbell* (6) as shewing that these order and disposition clauses in the Bankruptcy Acts are aimed at goods which are in the trader's possession in bad faith, and where the owner of the goods allows them to remain in the possession of a trader in whose possession they ought not to be. The same object is aimed at by s. 44 (iii.) of the Act of 1883. In a nisi prius case tried by Darling J. (7) similar stands were held, as matter of law, not to be within the section. The possession of the stands by the bankrupt here does not, on the facts, raise any presumption of reputed ownership by her.

Danckwerts, for the respondent. The question was one of fact for the jury; there is no complaint of misdirection; so that, if there was any evidence upon which the jury could find as they did, the respondent is entitled to judgment. The words "in his trade or business" are substituted for "being a trader" in s. 44, sub-s. 3, but that substitution has not effected an alteration of the doctrine of reputed ownership. The words "under such circumstances that he is the reputed owner thereof" are material. They were inserted with the object of preventing a trader from obtaining credit from persons who

(1) (1885) 15 Q. B. D. 441.
(2) (1885) 30 Ch. D. 261; (1886) 11 App. Cas. 426.
(3) 11 App. Cas. at p. 440.
(4) 11 App. Cas. at pp. 442, 443.
(5) (1749) 1 Ves. Sen. 348.
(6) (1804) 1 Sch. & Lef. 328.
(7) Unreported.

1899

SHARMAN v. MASON.

thought he was the owner of things which he used in the course of his business. It is not necessary that the trader should be able to sell or pledge them in the course of his business; it is enough if he has goods in his possession which he uses for, or are connected with, the carrying on of his business, so that persons dealing with him might give him credit on the faith of those goods being his own property. The principle is stated by Lord Selborne L.C. in *Ex parte Watkins, In re Couston* (1), and by the judges of the Court of Appeal in *Colonial Bank* v. *Whinney* (2): see judgments of Cotton L.J. (3) and Lindley L.J. (4) In that case it became unnecessary for the House of Lords to put a construction on the words "in his trade or business"; but Lord Blackburn (5) approves the principle stated by Lord Selborne in *Ex parte Watkins, In re Couston* (1), that if a person "remains in possession with the reputation of ownership, and in those circumstances which create a reputation of ownership, then the property will pass to his assignees; but it is always a question of fact whether or no the circumstances are such as to create that reputation." In the passage relied on in Lord Watson's judgment the words "or otherwise obtained credit upon them" mean "obtained credit on the faith of the goods being the bankrupt's goods." Unless customers would know, by reason of some practice or custom, that the goods were not the bankrupt's goods, the doctrine of reputed ownership applies: *Thackthwaite* v. *Cock* (6); *Whitfield* v. *Brand* (7); *Priestley* v. *Pratt* (8); *Ex parte Watkins, In re Couston* (1), judgment of Mellish L.J. (9) The reputation of ownership was established by the facts proved in the present case. [He also referred to *Ex parte Ford, In re Caughey.* (10)]

J. Cranstoun, in reply, referred to *Lingard* v. *Messiter.* (11)

Cur. adv. vult.

(1) (1873) L. R. 8 Ch. 520, at p. 528.
(2) 30 Ch. D. 261.
(3) 30 Ch. D. at p. 274.
(4) 30 Ch. D. at pp. 280–81.
(5) 11 App. Cas. 426, at p. 436.
(6) (1811) 3 Taunt. 487.
(7) (1847) 16 M. & W. 282.
(8) (1867) L. R. 2 Ex. 101.
(9) L. R. 8 Ch. at p. 533.
(10) (1876) 1 Ch. D. 521.
(11) (1823) 1 B. & C. 308.

Nov. 2. The following written judgments were delivered :— 1899

SHARMAN v. MASON.

RIDLEY J. (after stating the facts as set out at p. 679, ante). The question for decision is whether these stands, used for the exhibition of goods for sale, but not being a part of the goods for sale, were goods in the order and disposition of the bankrupt within the meaning of s. 44 (iii.) of the Bankruptcy Act, 1883. The words of that section, so far as material, are, "all goods being in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof"; and they have more than once been the subject of judicial construction. In the case of *In re Jenkinson, Ex parte Nottingham and Nottinghamshire Bank* (1), where the bankrupt was a stockbroker, silversmith, and watchmaker, it was decided that certificates of shares, deposited by him with bankers in his own name to secure his trade account, did not pass to the trustee because they were not in his possession "in his trade or business." The words of the Act were distinguished from those of the Act of 1869, and it was pointed out by the Court that goods, if they are to pass to the trustee, must come into the bankrupt's possession in his trade or business, and not merely as a trader. The question arose again for determination in the case of *Colonial Bank* v. *Whinney*. (2) There the bankrupts, who were stock and share brokers, and who were in the habit of purchasing shares and obtaining advances on them by equitable mortgages, had deposited shares so bought to secure an advance made to them by a bank, and the question was whether the trustee in bankruptcy could take the shares as being within the operation of this clause. In the end it was decided by the House of Lords that the shares were choses in action within the proviso at the close of the section; but as the majority of the Court of Appeal was of a different opinion on that point, it was necessary for them to determine whether the shares were goods in the order and disposition of the bankrupts in their trade or business. Cotton L.J. says (3) : "Of course, where

(1) 15 Q. B. D. 441. (2) 30 Ch. D. 261; 11 App. Cas. 426.
(3) 30 Ch. D. at p. 274.

1899

SHARMAN v. MASON.

Ridley J.

the goods are in the nature of stock-in-trade there is no difficulty; goods apparently forming part of the stock-in-trade of the firm must be in the order or disposition of the bankrupt in his trade or business. But, in my opinion, the words go further than that. I think the true construction is that the goods must be in his order or disposition for the purposes of, or purposes connected with, his trade or business." Lindley L.J. agreed, and the decision was that, as the custom of the firm was to buy shares out of the partnership money, and use them for the partnership business, and as these shares were intended to be so used, they were in the order and disposition of the bankrupts within the meaning of the statute. It further appears from the judgment of Lindley L.J. that the chief doubt in his mind arose from the fact that the shares were not visible. He says (1): "One question is, whether that expression" ("in his trade or business") "is applicable to any but visible things. There is no difficulty in understanding that goods and chattels in the ordinary sense—visible things in any shop or factory—are in a man's trade or business, and it was ably contended by the appellants that nothing was in a man's trade or business within the meaning of this section which was not visible." Now, in the present case, the stands in question are visible, so that the argument which had so much weight with the Lord Justice cannot be raised. And the stands, though in a different way, are quite as much connected with the trade or business as were the shares in the *Colonial Bank Case*. (2) During the argument several instances were put by the appellant of things used similarly to the stands which would not, as it was contended, be considered to be connected with the bankrupt's trade or business. Such were a brougham to convey goods, or stands of little value in a wig shop. But it appears to me that in each instance the things in question would be connected with the trade or business, and, therefore, within the order and disposition section if the bankrupt was in possession of them "in such circumstances that, as reputed owner, he could have sold them, or otherwise obtained credit upon them, in the course of his trade or business." That point did not arise in the *Colonial*

(1) 30 Ch. D. at p. 280. (2) 30 Ch. D. 261; 11 App. Cas. 426.

Bank Case (1), for it was conceded; but those are the words of Lord Watson (2) when the case was under the consideration of the House of Lords. It was argued, indeed, in the present case that, in order to satisfy these words, the very particular things must be such as the bankrupt could have obtained money upon if he were to pledge them, and that the stands were not such. I, however, think it more probable that Lord Watson was dealing with the goods and chattels as a whole, and that all goods which might be held to have sufficient importance to enter into the value of the trade or business in the mind of an intending lender would fall within the rule. That question would be one of fact, and would be for a jury; and I think that a direction to that effect would be more accurate than one that the jury should merely consider the value of each particular thing. Here the question was left to the jury by the recorder —in the general form, it is true—and they answered it in favour of the trustee; nor can this Court alter the decision.

It was further urged for the appellant that the possession of these stands would not raise a presumption of reputed ownership by the bankrupt, and the case of *Ex parte Watkins, In re Couston* (3), was quoted as much in point on that question for the respondent. I think where it is known generally, as it was there found to be, that the trader may be in possession of the goods in some other capacity, such as warehouseman or factor, they are not within the statute. Such a case was that of the wine merchant in *Ex parte Watkins, In re Couston* (3), and of the bookseller in *Whitfield* v. *Brand*. (4) Guns left at a gunmakers for repair, or plate, will afford other examples; but in each case it is a question of fact, and is properly to be determined by a jury. Nor do I see that in such a case as the present it can be said that a finding in favour of the trustee was a wrong finding. Certainly no custom can be alleged here at all similar to those found in the wine merchant and bookseller's cases. *Thackthwaite* v. *Cock* (5), quoted in the argument, was a case relating to hops left in the merchant's warehouse

(1) 30 Ch. D. 261; 11 App. Cas. 426.
(2) 11 App. Cas. at p. 440.
(3) L. R. 8 Ch. 520.
(4) 16 M. & W. 282.
(5) 3 Taunt. 487.

1899

SHARMAN v. MASON.

Ridley J.

after sale, where it was found that the custom was not found as a fact. The appellant further placed reliance on the observations made by Lord FitzGerald in the *Colonial Bank Case* (1), and on the earlier cases of *Ryall* v. *Rowles* (2) and *Joy* v. *Campbell* (3), as shewing that there must be something contrary to good faith in the transaction before the Court will allow goods belonging to one person to be taken in satisfaction of the debt of another. No doubt the possession, order, and disposition must be in a person who is not the owner, and "who ought not to have them"; and, no doubt, the object of the Acts of Parliament passed on this subject has been "to prevent deceit by a trader from the visible possession of a property to which he was not entitled." Those are the words of Lord Redesdale in *Joy* v. *Campbell* (4), many times approved by subsequent decisions. But they do not mean that it is necessary, in order that the statute may apply, that there should be any actual bad faith. If so, where was the bad faith in the *Colonial Bank Case* (5), in which, according to the opinion of the Lords Justices, the shares were in the order and disposition of the bankrupts? The same observation applies to many other cases. It is true that Lord Redesdale uses the word "unconscientiously"—"whom the owner permits unconscientiously to have such order and disposition"; but he adds, "as the Act supposes." The expressions mean no more than this—that the mere possession by a person not the owner, with the consent of the true owner, so as to obtain credit, was considered by the Legislature unfair.

I would add that the case of *Lingard* v. *Messiter* (6) does not appear to me to affect the principle under discussion, and merely turns upon the evidence produced in that particular case to shew that the bankrupt in question had ceased to be the reputed owner of the goods.

For these reasons, I think that there was evidence on which the jury might properly find as they did, and that the appeal should be dismissed.

(1) 11 App. Cas. at p. 443.
(2) 1 Ves. Sen. 348.
(3) 1 Sch. & Lef. 328.
(4) 1 Sch. & Lef. at p. 336.
(5) 30 Ch. D. 261.
(6) 1 B. & C. 308.

1899

SHARMAN v. MASON.

DARLING J. The facts of this case being as stated by my learned brother, it becomes necessary to determine whether stands, or models for the display of costumes, when allowed by the true owner of them to remain in possession of a bankrupt person for the purpose of displaying upon them for sale clothes sold by the bankrupt in the ordinary course of his business, are goods "in the possession, order, or disposition of the bankrupt in his trade or business" within the meaning of s. 44 of the Bankruptcy Act, 1883.

It was argued by Mr. Jelf, on behalf of the appellant, that these goods are not subject to that section of the Act, because they were not such things as were for sale in the business of the bankrupt. Now, if I could entirely accept some of the expressions used in judgments given in the older cases, I should agree that this is the law to-day; but, having regard to the language of judges of late years, I cannot think that such phrases as, "The goods must be such as the party suffers the trader to sell as his own," can now be accepted, although they are quoted with apparent approval by Parke B. in *Whitfield* v. *Brand*. (1) As to what may be the real meaning of the words in question, there is, I think, no direct authority. Indeed, it is said by Lord FitzGerald in the latest case—*Colonial Bank* v. *Whinney* (2)—that "their construction has yet to be determined." It is to be remarked, however, that the words are not now, and have not been since 6 Geo. 4, c. 16, s. 72, what they were when many of the earlier cases were decided. It is pointed out by Parke B. in *Whitfield* v. *Brand* (1) that they now stand as "possession, order, *or* disposition" instead of "possession, order, *and* disposition." I think, therefore, that it is enough if these goods were in the *possession* of the bankrupt in his trade or business, although they were not in his *disposition* therein, in the sense that they were such things as he sold in his trade. The words "order or disposition" seem to me necessary to enlarge the word "possession," so as to include something beyond visible occupation by a reputed owner. If it be said that this construction appears inconsistent with Lord Watson's words in *Colonial Bank* v. *Whinney* (2), "the principle which

(1) 16 M. & W. 282. (2) 11 App. Cas. 426.

1899

SHARMAN v. MASON.

Darling J.

appears to me to be deducible from the authorities is this—that goods belonging to a third party are not within s. 44 (iii.) of the Bankruptcy Act, 1883, unless they were left with the bankrupt in such circumstances that, as reputed owner, he could have sold them, or otherwise obtained credit upon them, in the course of his trade or business," then I would answer that I understand Lord Watson to have meant by obtaining credit upon the goods, not merely getting a loan by pledging them, but obtaining credit on the purchase of other goods because of the bankrupt appearing to own things valuable for business purposes, though not for sale in his business. This construction recommends itself to me as being entirely consonant with the passage quoted by Lord Ashbourne from *Ryall* v. *Rowles* (1) as applicable to the existing bankruptcy law, that the intent of it is "to prevent traders from gaining a delusive credit by a false appearance of substance to mislead those who should deal with them": see *Colonial Bank* v. *Whinney*. (2) Moreover, I think there is extreme force in the following passage from the judgment of Cotton L.J. in *Colonial Bank* v. *Whinney* (3): "What meaning, then, are we to give to those words? Of course where the goods are in the nature of stock-in-trade there is no difficulty, goods apparently forming part of the stock-in-trade of the firm must be in the order or disposition of the bankrupt in his trade or business. But, in my opinion, the words go further than that. I think the true construction is that the goods must be in his order or disposition for the purposes of, or purposes connected with, his trade or business." It is plain that the words used by the Lord Justice would cover goods much less directly connected with the bankrupt's trade than are those here in question. Indeed it is probable that, although not for sale, these stands might rightly be considered as part of the stock-in-trade of the bankrupt, as being goods necessary to the carrying on of the trade or business. Further on in the same case Lindley L.J. (4) construes these words as meaning "not merely visibly employed in his trade or business, but acquired for the purposes of the business, and used for those

(1) 1 Ves. Sen. 348.
(2) 11 App. Cas. at p. 447.
(3) 30 Ch. D. at p. 274.
(4) 30 Ch. D. at p. 281.

purposes." The decision of the Court of Appeal in which these expressions were used was reversed by the House of Lords, but the reasoning of the Lords Justices upon these points remains unaffected by that decision. Still, the passages I have quoted from their judgments are said by Mr. Jelf, though I do not agree with him, to be obiter dicta, and, further, to be in conflict with an unreported decision of my own at nisi prius. Such decisions at nisi prius as had the good fortune to be reported by Lord Campbell are admittedly of high authority; but I cannot bring myself to attribute to that particular decision of a court of first instance which has been pressed upon me an authority overbearing the opinions of the Lords Justices, obiter dicta though they be.

Appeal dismissed.

Solicitor for appellant: *S. S. Seal.*
Solicitor for respondent: *Charles Butcher.*

W. A.

1899
Oct. 31;
Nov. 1, 6.

GEORGE BOOKER & CO. *v.* THE POCKLINGTON STEAMSHIP COMPANY, LIMITED.

Ship—Charterparty—Construction—Division of Sum Awarded for Salvage Services.

A charterparty provided (clause 2) that the shipowner should maintain the chartered vessel (the steamship *Pocklington*) in a thoroughly efficient state for and during the service. Clause 6 provided that if any damage prevented the working of the vessel for more than twenty-four hours the hire should cease. By clause 13 the vessel had liberty to tow and assist vessels in distress, and to deviate for the purpose of saving life or property. By clause 20 all derelicts and salvage were to be "for owners' and charterers' equal benefit." The shipowners obtained an award in the Admiralty Court for a large sum for salvage services rendered by the *Pocklington* in towing another vessel in distress. Through performing those services the hull, engines, and towing gear of the *Pocklington* were strained and damaged, and she incurred expenses and losses attributable to the salvage services in respect of repairs, the costs of gear used in towage, loss of hire for several days whilst she was under repair, and other matters. In an action by the charterers against the shipowners to recover a moiety of the salvage earned by the *Pocklington*:—

Held, that the defendants were entitled to deduct from the amount awarded by the Admiralty Court all such losses and expenses incurred by them (including loss of hire) as were attributable to the salvage services, and that the balance only ought to be divided between themselves and the plaintiffs.

COMMERCIAL CAUSE tried before Bigham J.

The action was by charterers against owners of a ship to recover, under the charterparty, the plaintiffs' proportion of a sum awarded to the defendants in respect of salvage services rendered by the ship.

The action was tried upon an agreed statement of facts, which was as follows:—

1. The defendants are the owners of the steamship *Pocklington*. The plaintiffs at the time material to the questions in this action were the charterers of the steamship.

2. By a charterparty dated August 9, 1898, and made

between the plaintiffs and defendants, the plaintiffs chartered the *Pocklington* for three round voyages between the United Kingdom, the West Indies, $\frac{\text{and}}{\text{or}}$ Bermuda at the rate of 525*l.* per calendar month.

The following, amongst others, were clauses in the charter-party:—

Clause 2: "That the owners shall provide and pay for all the provisions and wages of the captain, officers, engineers, donkey engineers, firemen and crew, ... and maintain her in a thoroughly efficient state in hull and machinery for and during the service."

Clause 6: "That in the event of loss of time, from deficiency of men or stores, breakdown, repairs or stoppage of machinery, or causes appertaining to the duties of the owners, or damage preventing the working or sailing of the vessel at any time for more than twenty-four hours, the hire shall cease until she be again in an efficient state to resume her service; and if in consequence of such deficiency, breakdown, repairs, stoppage, or other causes the vessel puts into any port or ports other than those to which she is bound, port charges, pilotage, &c., at those ports shall be borne by the owners; but should the vessel be driven into port, or to anchorage by stress of weather, such detention or loss of time shall be at the charterers' expense. In the event, during this charter, of a cessation of hire under this clause, ... all coal consumed during the period of such cessation shall be for owners' account."

Clause 13: "The steamer has liberty to call at any ports in any order, to sail without pilots, and to tow and assist vessels in distress, and to deviate for the purpose of saving life or property."

Clause 14: "The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, assailing thieves, arrest and restraint of princes, rulers, and people, collisions, strandings, and other accidents of navigation mutually excepted, even when occasioned by the negligence, default, or error in judgment of pilots, masters, mariners, or other servants of the shipowners; but this clause is not to be construed as in any way

1899

BOOKER & Co. v. POCKLINGTON STEAMSHIP COMPANY.

affecting or cancelling the provision for cessation of hire, as provided for in this charterparty."

Clause 20: "All derelicts and salvage shall be for owners' and charterers' equal benefit. Penalty for non-performance of this contract estimated amount of damages."

3. The plaintiffs' claim is a moiety of some salvage earned by the *Pocklington* during the charterparty, and to a return of hire.

4. On January 3, 1899, during the second voyage under the charterparty, the *Pocklington* fell in with the disabled steamship *Dart*, and tendered salvage services to her by towing her into Queenstown Harbour.

5. On January 9, 1899, the owners of the steamship *Pocklington* (the defendants in this action) and others commenced an action in the Admiralty Division of the High Court of Justice to recover salvage from the owners of the steamship *Dart*, her cargo and freight.

6. At the conclusion of her voyage in January, 1899, the *Pocklington* was docked and repairs were being executed upon her from January 11 until January 24.

7. By their statement of claim in that action the owners of the *Pocklington* alleged in paragraph 11 as follows:—

"The *Pocklington* towed the *Dart* 313 miles, and stood by at request for a very long time, and lost four days. Her hull, engines, and towing gear were strained and damaged, and part of her cargo lost, and losses and expenses have been incurred."

Particulars of the claim of such losses and expenses were delivered on January 23, 1899, in the said action and consisted of the cost of:—

(1.) Repairing damage done to the vessel;

(2.) Renewing fractured tail-end shaft;

(3.) Ropes and gear used in towage;

(4.) Extra oil and coal;

(5.) Port bill at Queenstown; and

(6.) Detention during repairs.

8. On January 26, 1899, the action for salvage came on for hearing before Phillimore J., who by his judgment awarded to

the owners of the steamship *Pocklington* the sum of 2750*l.*, as well as the costs of the action.

9. The defendants contend that before dividing the award there should be deducted therefrom—(1.) the amount of the repairs attributable to the salvage services, (2.) the cost of renewing the fractured tail-end shaft, (3.) the cost of ropes and gear used in towage, (4.) the cost of extra oil and coal consumed, (5.) the port bill at Queenstown, (6.) the hire for the period during which the *Pocklington* was under repair, and (7.) the balance of costs incurred in the salvage action over and above the taxed costs recovered from defendants, and that the balance is divisible between the present plaintiffs and defendants.

10. The plaintiffs contend that the amount to be divided should be the amount of the award, namely, 2750*l.* less the extra costs in the salvage action as above, and that half of the balance is due from the defendants.

The plaintiffs further contend that, if the defendants are entitled to deduct the amounts set out in paragraph 9 hereof, the plaintiffs are also entitled to have deducted from the award, and paid to them in full, the loss of time during the services and the cost of extra coal consumed. This contention the defendants admit.

11. The plaintiffs further contend that the defendants are not entitled to deduct the hire during the time the *Pocklington* was under repair, inasmuch as the same does not represent hire earned under the terms of the charterparty.

The opinion of the Court is desired upon the above contentions.

Carver, Q.C. (*Bateson* with him), for the plaintiffs.

Butler Aspinall, Q.C. (*Arthur Lennard* with him), for the defendants.

The arguments, it is thought, sufficiently appear from the contentions stated in the agreed statement of facts, and the judgment of Bigham J.

Cur. adv. vult.

1899

BOOKER & Co. v. POCKLINGTON STEAMSHIP COMPANY.

Nov. 6. BIGHAM J. read the following judgment:—If clause 20 of the charterparty stood alone there could, I take it, be no doubt as to its meaning. "Equal benefit" cannot be accorded to shipowner and charterer without taking into account what each has contributed towards securing the benefit. Salvage in this clause does not mean the amount recovered in the suit in the Admiralty Court. It means the net pecuniary result of the salvage operations. Therefore, it follows that from the sum awarded by the Admiralty Court all the losses mentioned in paragraph 9 of the case must be deducted by the shipowner, and the balance only divided. Such a division will satisfy the requirements of clause 20. But it is said that clause 20 must be read by the light of the other clauses of the charterparty, and particularly of clauses 2 and 6. I agree that the document is to be read as a whole, and that if it appears that some clauses are intended to qualify the interpretation of others effect must be given to such intention. I do not, however, think that any clause in the charterparty is intended to affect or alter what I conceive to be the clear meaning of clause 20. Clause 2 provides that the shipowner is to maintain the vessel in a thoroughly efficient state for and during the service, and clause 6 provides that if any damage prevents the working of the vessel for more than twenty-four hours the hire shall cease. The charterers say that the interpretation which I put on clause 20 relieves the shipowners of the burdens which these two clauses impose upon them, and does it at the charterers' expense, inasmuch as it has the effect of reducing the amount of salvage to be divided. I do not, however, agree with this contention. It is the salvage operations which have caused the damage and the loss of hire, and the Admiralty Court, though not awarding to the ship a specific sum in respect thereof, have taken both heads of loss into consideration in fixing the amount payable by the salved vessel. In other words, if there had been no loss of hire and no damage to the vessel the award would have been proportionately less, and the charterers would have got what they get now, neither more nor less.

[It was agreed that there should, if necessary, be an inquiry to ascertain the loss sustained by reason of the salvage services. Liberty to apply to the learned judge was reserved.]

Judgment for the defendants accordingly.

Solicitors for plaintiffs: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for defendants: *Downing, Bolam & Co., for Bolam & Co., Sunderland.*

W. A.

END OF VOL. II.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 2, 1899, will be as follows :—

In the First Series,
[1899] 1 Ch. [1899] 2 Ch.

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In the Third Series,
[1899] A. C.

INDEX.

ACCIDENT—Transfer of action—Fatal accidents —Decree for limitation of liability in the Admiralty Division - - 502
See PRACTICE. 7.

—— Workmen's Compensation Act.
See Cases under EMPLOYER AND WORKMAN.

ACKNOWLEDGMENT — Receipt by fellow-servant—Money received by servant on account of master and handed over to fellow-servant - - - 158
See REVENUE. 8.

ADMIRALTY—Transfer of action—Fatal accidents—Decree for limitation of liability in the Admiralty Division - 502
See PRACTICE. 7.

ADMITTANCE TO COPYHOLD—Fine—Limitation of action—Point from which time begins to run - - - 603
See COPYHOLD.

AFTER-ACQUIRED PROPERTY—Undischarged bankrupt—Wagering contract—Stakes claimed by trustee - - - 560
See BANKRUPTCY. 13.

AGENT—Contract by, in name of principal but for his own benefit — Ratification by principal - - - - 66
See PRINCIPAL AND AGENT.

—— Signature by agent "thereunto lawfully authorized"—Memorandum in writing —Statute of Frauds - - 414
See CONTRACT. 2.

AGRICULTURAL HOLDINGS—Improvements—Right of tenant to compensation under agreement - - - - 618
See LANDLORD AND TENANT. 1.

ALEHOUSE - - - - - - 455
See LICENSING ACTS. 2.

AMENDMENT—Power of—Franchise — Occupiers' list—Notice of objection - 273
See PARLIAMENT.

ANNUITY — Bequest of — Settlement estate duty - - - - - 253
See REVENUE. 1.

—— Estate duty—Change of security - 595
See REVENUE. 2.

APPEAL—Costs—Trustee in bankruptcy - 566
See BANKRUPTCY. 3.

APPRENTICE—Infant's benefit — Contract not for—Employers and Workmen Act, 1875
See INFANT. 1

ARBITRATION—Unwholesome meat—Findings of arbitrator—Costs of summons - 286
See LOCAL GOVERNMENT. 2.

ARMY — Troops summoned to preserve the peace — Expenses of maintenance — Liability—Mandamus - - 536
See COUNTY COUNCIL.

ASSESSMENT—Power of Court to go behind — Proof for assessed taxes — Scheme of arrangement - - - 145
See BANKRUPTCY. 9.

ASSIGNMENT — *Debt — Security — Power to Assignee to Sue in name of Assignor—Absolute Assignment — Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

The plaintiffs made an advance to a customer who, in consideration thereof, assigned to them the whole of his rights and interest under an agreement between himself and others, of whom the defendant was one, as security for the repayment on demand of the advance, and by the assignment he appointed the plaintiffs his nominees in pursuance of the provisions of the agreement, with power to exercise all his rights thereunder either in his name or in the plaintiffs' own name, and he appointed them his attorneys in that behalf. In an action to recover from the defendant moneys alleged to be due under the agreement :—

Held, that the assignment was not an absolute assignment within the meaning of s. 25 sub-s. 6, of the Judicature Act, 1873

Tancred v. *Delagoa Bay Ry. Co.*, (1889)

ASSIGNMENT—*continued.*
23 Q. B. D. 239, and *Comfort* v. *Betts* [1891] 1 Q. B. 737, distinguished. MERCANTILE BANK OF LONDON *v.* EVANS - - - **C. A. 613**

—— Covenant to repair — Mesne assignment—Breach of covenant before assignment *See* LANDLORD AND TENANT. 3. **148**

—— Dividend — Right of assignee to demand from trustee—Jurisdiction—Creditor *See* BANKRUPTCY. 1. **50**

ATTACHMENT—Debt—Garnishee order, action upon—Judgment - - - **428**
See PRACTICE. 1.

AVERAGE—General average - **356, 403**
See SHIPPING. 3, 4.

BANKER—*Cheque—Defective Title—Payment in good Faith and without Negligence—Liability of Banker—"Customer"—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 82.

Whether a person is a "customer" of a bank, within the meaning of the Bills of Exchange Act, 1882, s. 82, is a question of fact.

By s. 82, where a banker, in good faith and without negligence, receives payment for a customer of a crossed cheque, and the customer has no title, or a defective title, the banker incurs no liability to the true owner by reason only of having received payment.

A rate collector had been in the habit of receiving cheques for rates, and cashing them at a country branch of the defendants' bank, where he was known, but had no account. By falsely pretending that a rate was due he obtained from the plaintiffs a cheque, drawn to his order on a London bank, crossed generally, and marked "not negotiable," which he presented at the defendants' branch bank. The cheque was cashed, and a portion of the proceeds applied according to the collector's request. The balance was paid to him, and he appropriated it.

On the trial of an action to recover the cheque, or its proceeds, it was found as fact that the defendants received payment in good faith and without negligence, that they received it for the collector, and that the collector was a customer:—

Held, by Bigham J., that the defendants were protected by s. 82, and were not liable. GREAT WESTERN RAILWAY COMPANY *v.* LONDON AND COUNTY BANKING COMPANY - **Bigham J. 172**

BANKRUPTCY—*Assignment of Dividend—Right of Assignee to Demand Payment from Trustee—Jurisdiction — Creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 58, 63, *Forms* 122 (*a*), 126.

Certain creditors of a bankrupt, whose proofs had been allowed in the bankruptcy, assigned their debts to the respondent, who applied to the county court in which the bankrupt's estate was being administered for an order under s. 63 of the Bankruptcy Act, 1883, that the trustee should pay to the respondent the dividend payable in respect of the debts so assigned:—

Held, that there was no jurisdiction to make the order. *In re* FROST. *Ex parte* OFFICIAL RECEIVER - - - - - **Div. Ct. 50**

BANKRUPTCY—*continued.*

2. —— *Execution Creditor—Levy by Sheriff—Bankruptcy of Judgment Debtor—Tools of Trade—Small Debts Act*, 1845 (8 & 9 *Vict. c.* 127), *s.* 8—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11.

A sheriff seized the goods of a judgment debtor under a writ of fi. fa. at the suit of a judgment creditor for more than 20*l.*, and advertised them for sale, except the debtor's tools of trade, &c., to the value of 5*l.*, as provided by s. 8 of the Small Debts Act, 1845. Before the sale a receiving order was made against the debtor, and thereupon he claimed that, by virtue of s. 44 of the Bankruptcy Act, 1883, his tools of trade, &c., to the value of 20*l.* were excepted from the sale. The official receiver made no request to the sheriff under s. 11 of the Bankruptcy Act, 1890, and declined to interfere:—

Held, (1) that s. 8 of the Small Debts Act, 1845, was in no way modified or extended by s. 44 of the Bankruptcy Act, 1883; and (2) that the sheriff was bound to sell, and under s. 11 of the Bankruptcy Act, 1890, to hand over the proceeds of sale, less costs of execution, to the official receiver, although, had there been no sale, the debtor would have been entitled under s. 44 of the Bankruptcy Act, 1883, to his tools of trade, &c., to the value of 20*l.* *In re* DAWSON. *Ex parte* DAWSON - - - - **Wright J. 54**

3. —— *Execution Creditor—Sheriff, Sale by—Proceeds of Sale—Landlord—Rent in Arrear—Lien—Priority—Payment by Sheriff—Indemnity—Title to Proceeds of Execution—Official Receiver—Trustee—"Goods of a Debtor"*—8 *Anne*, *c.* 14 (*c.* 18 *in Rev. Stat.*), *s.* 1—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c* 71), *s.* 11—*Appeal—Trustee in Bankruptcy—Costs.*

Where under an execution the sheriff sells the goods of the judgment debtor, and subsequently, under s. 11 of the Bankruptcy Act, 1890, receives from the official receiver notice of bankruptcy proceedings commenced against the debtor since the sale, together with a demand for payment of the proceeds of sale, he is entitled to retain out of the proceeds and pay the landlord of the premises on which the execution was levied any arrears of rent due to him from the debtor, not exceeding the amount of one year's rent, even though he, the sheriff, has not received notice of the landlord's claim until after the sale, and notwithstanding that the sale has deprived the landlord of the lien given him on the goods themselves by s. 1 of 8 Anne, c. 14 (c. 18 in Revised Statutes).

The right of the landlord to be paid out of the proceeds of sale in the hands of the sheriff, where no bankruptcy intervenes—a right established by the practice uniformly adopted under the statute of Anne and recognised by judicial authority long before the present law of bankruptcy—is not affected by s. 11 of the Bankruptcy Act, 1890. The expression "the goods of a debtor" in that section does not include the goods of a judgment debtor, which are by the statute of Anne impounded until the landlord is paid; nor are the proceeds of sale of those goods to be handed by the sheriff to the trustee in

BANKRUPTCY—*continued.*

bankruptcy under that section free from the right of the landlord, sanctioned by long practice, or of the sheriff for his own indemnity.

In re M'Carthy, (1881) 7 L. R. (Ir.) 473, approved and followed.

Decision of Divisional Court (Wright and Bigham JJ.) reversed.

A trustee in bankruptcy who is respondent to a successful appeal is not entitled, as a matter of course, to have the costs paid out of the bankrupt's estate: unless he can make out a right to the contrary, he will be ordered to pay them personally.

Ex parte Stapleton, (1879) 10 Ch. D. 586, not followed. *In re* MACKENZIE. *Ex parte* SHERIFF OF HERTFORDSHIRE - - - **C. A. 566**

4. —— *Fraud—Contract induced by Fraud of Bankrupt—Election by Vendor to affirm Contract—Petition by Secured Creditor—Right of Trustee to Redeem Security at Value assessed in Petition—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-s.* 2; *Sched. I., r.* 12, *and Sched. II., rr.* 11-13—*Bankruptcy Rules*, 1886, *r.* 353—*Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 100.

When a secured creditor presents a bankruptcy petition against his debtor and adjudication follows, there is nothing in the Bankruptcy Act, 1883, or the rules thereunder, that entitles the trustee in bankruptcy to redeem the petitioning creditor's security at the value he places on it in his petition.

V. bought shares of H. and induced H. to give him the certificates of the shares and to accept his cheque for 3298*l.* 16*s.* in payment, representing that it would be met. The cheque was dishonoured and V. absconded. Soon afterwards V. was adjudicated bankrupt on a petition presented against him by H., based on the dishonoured cheque, H. alleging in his petition that he had a security or lien on the shares, which security or lien he valued at 3200*l.* Meantime H. had issued a warrant against V., under which he was arrested and committed for trial for fraud, and subsequently convicted. Thereupon the certificates of the shares were, on an order of the Court made under s. 100 of the Larceny Act, 1861, restored to H. The trustee in bankruptcy of V. then claimed to redeem the shares at the value placed on them by H. in his petition:—

Held, first, that as the title to the shares had, on the conviction of V., revested in H. under s. 100 of the Larceny Act, 1861, he ought not to be deprived of them by reason of his mistake in treating them as a security in his petition; and, secondly, that even if H. had affirmed the contract of sale for the shares, there was nothing in the Bankruptcy Act, 1883, or the rules thereunder, that entitled the trustee to redeem the shares at the amount at which they were valued in the petition.

In re Lacey, (1884) 13 Q. B. D. 128, distinguished. *In re* VAUTIN. *Ex parte* SAFFERY.
Wright J. 549

5. —— *Insolvent Testator — Administration Order — Official Receiver, Vesting in — Vesting Order, Effect of — Executor—Debt — Retainer—Assertion of Right—Payment of Assets to Official*

BANKRUPTCY—*continued.*

Receiver without retaining Debt—Mistake—Repayment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 125, *sub-ss.* 1, 2, 5, 9.

An executor who is a creditor of his testator is not bound, in order to preserve his right of retainer out of the assets he has got in, to assert his right before occasion arises, as on an attempt to take assets out of his possession: if he asserts it then, his right will be protected, unless he has done some act, by release or otherwise, to deprive himself of it.

When an order has been made under s. 125, sub-ss. 1, 2, of the Bankruptcy Act, 1883, for the administration of the estate of an insolvent testator, thus vesting the estate in the official receiver under sub-s. 5, the effect of the order is to vest in the official receiver so much only of the estate as is properly distributable among the creditors, and not to deprive third parties of any rights which they have acquired to withdraw from distribution assets in their possession and which they have a right to retain.

Thus, such an order does not deprive an executor-creditor of his legal and equitable right of retainer out of the assets which he has got in, even though by mistake and in ignorance of his rights he has paid over the assets to the official receiver under the administration order; nor is he deprived of that right by proving for his debt in the bankruptcy, if on discovering his error he withdraws his proof. In that case he is entitled to be repaid the sum he would have been entitled to retain had the assets been still in his possession.

Decision of Wright J., [1899] 1 Q. B. 905, affirmed. *In re* RHOADES. *Ex parte* RHOADES
C. A. 347

6. —— *Order and Disposition — Reputed Ownership — Goods used by Bankrupt "in his Trade or Business" — Stands used to shew off Goods in Shop—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44 (iii.).

In order to establish that goods were, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt "in his trade or business," within the meaning of s. 44 (iii.) of the Bankruptcy Act, 1883, it is not necessary to shew that the goods were such as the bankrupt could pledge or sell in the course of his business; it is enough to shew that they were in his possession, order, or disposition for the purposes of, or purposes connected with, his trade or business.

In an action to recover possession of stands used in the business of a mantle-maker for the purpose of shewing off to advantage the mantles in her shop, it was proved that the stands were in her possession with the consent of the plaintiff, who was the true owner of them; that the mantle-maker subsequently became bankrupt, and that the defendant, her trustee in bankruptcy, had thereupon removed them from her shop:—

Held, that there was evidence for the jury that the stands were goods "in the possession, order, or disposition of the bankrupt, in her trade or business, by the consent and permission of the true owner, under such circumstances that she was the reputed owner thereof" within the mean-

BANKRUPTCY—*continued.*
ing of s. 44 (iii.) of the Bankruptcy Act, 1883.
SHARMAN *v.* MASON - - - **Div. Ct. 679**

7. —— *Proof—Contract to take Shares in a Company—Disclaimer by Trustee in Bankruptcy—Proof for Injury caused by Disclaimer—Measure of Damages—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55.

By a contract made in February, 1898, H. agreed to sell to a company certain properties; and by the same contract H. agreed to subscribe and pay for in cash so much of the share capital of the company as should not be taken up by the public. In the events which happened H. became bound under the contract to take up and pay for certain preference shares and 25,000 ordinary shares of 1*l.* each in the company. In June, 1898, H. became bankrupt, and in the July following his trustee in bankruptcy disclaimed the contract. Soon afterwards the company went into liquidation, and the liquidator lodged a proof against H.'s estate for damages for breach of the contract. H.'s estate was estimated to realize not more than 4*s.* in the pound. The liabilities of the company were about 16,000*l.*, whilst its assets comprised, practically, about 4000*l.* at a bank and the claim against H.'s estate. The liquidator made a call of 1*l.* per share on the ordinary shares of the company, and claimed that the proof against H.'s estate should stand at 25,000*l.*, on the ground that the measure of damages for the injury caused to the company by the disclaimer was the loss of the call of 1*l.* per share on the 25,000 shares which H. was bound to take up. The trustee admitted the proof for 10,500*l.* only, that being the difference between the then estimated assets and liabilities of the company.

On appeal:—

Held, that, as the disclaimer had put an end to the contract, and the claim of the company could only be for damages for breach of the contract, the trustee had assessed the damages on the right principle, and that the proof must stand at 10,500*l.* *In re* HOOLEY. *Ex parte* UNITED ORDNANCE AND ENGINEERING COMPANY **Wright J. 579**

8. —— *Proof—Damages in the Divorce Court—Bankruptcy of Co-respondent—Provable Debt—Judgment Summons—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 33—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 10.

Damages awarded to a petitioner in the Divorce Court against a co-respondent, and ordered to be paid into court, although they will not support a bankruptcy petition against the co-respondent, are nevertheless a debt provable in his bankruptcy. The payment of such damages therefore cannot, if his bankruptcy supervenes, be enforced against him by a judgment summons under s. 5 of the Debtors Act, 1869. *In re* O'GORMAN. *Ex parte* BALE - **Wright J. 62**

9. —— *Proof for Assessed Taxes—Power of Court to go behind Assessment—Scheme of Arrangement—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 111, 113, 118—*Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *s.* 57—*Board of Trade Regulations, May*, 1888.

The rule that on a proof for a judgment debt the Court will go behind the judgment and ascertain whether there is a provable debt, does not apply to a proof for assessed taxes.

Where therefore a debtor, who had carried in a scheme of arrangement, applied to expunge a proof for an assessment to income tax under Sched. D (which had not been appealed against), on the ground that he had made no profits assessable to duty, the application was dismissed, but without prejudice to any application he might be advised to make to the Inland Revenue under the Board of Trade Regulations of May, 1888. *In re* CALVERT. *Ex parte* CALVERT **Wright J. 145**

10. —— *Receiving Order against Trustee—Practice—Trustee in Bankruptcy—Vacating Office—Rescission of Receiving Order—Restoration—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 85, 86, 87.

The 85th section of the Bankruptcy Act, 1883, provides that "if a receiving order is made against a trustee in bankruptcy he shall thereby vacate his office of trustee."

A receiving order was made against a trustee in bankruptcy, but was soon after rescinded on the ground that it ought never to have been made. A new trustee had not in the meantime been appointed:—

Held, that the trustee was restored to his original position. *In re* NEWMAN. *Ex parte* OFFICIAL RECEIVER - - **Wright J. 587**

11. —— *Stock Exchange—Broker and Customer—Customer's Speculative Account—Bankruptcy of Broker—Differences due to Customer—Rules of the Stock Exchange—Surplus in Hands of the Official Assignee of the Stock Exchange—Title of Trustee in Bankruptcy.*

A broker on the Stock Exchange was officially declared a defaulter. The same day the official assignee, under the Rules of the Stock Exchange, closed all accounts of the broker then open, and received and paid all amounts owing by or to him on the Stock Exchange, and, after payment of all the Stock Exchange liabilities of the broker, there remained a surplus in the hands of the official assignee. Shortly afterwards the broker was adjudicated bankrupt with large outside liabilities. Part of the surplus above mentioned comprised a sum of money which represented differences, being profits, due on contracts made with jobbers on the Stock Exchange by the broker as agent for an outside customer, who was running a speculative account on the Stock Exchange through him, and which the broker, had he been solvent, would have received for such customer on the day he became a defaulter. Both the customer and the trustee in bankruptcy of the broker having claimed this sum of money, the official assignee paid it into court under an interpleader summons:—

Held, that the sum of money in question was merely a book-debt of the broker and formed part of his general assets, and therefore passed to his trustee in bankruptcy; and that the remedy of

BANKRUPTCY—*continued.*
the customer was to prove in the bankruptcy for the amount. KING *v.* HUTTON **Phillimore J. 555**

12. —— *Trustee in Bankruptcy—Release of—Practice—Error in Administration—Revocation by Board of Trade—"Suppression or Concealment of any Material Fact"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 82.

Sect. 82, sub-s. 3, of the Bankruptcy Act, 1883, enacts that an order of the Board of Trade releasing a trustee in bankruptcy shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the bankrupt, or otherwise in relation to his conduct as trustee, "but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact."

In January, 1898, a trustee in bankruptcy disallowed a proof in the mistaken belief that it was not a provable debt, and by an oversight notice of rejection was not sent to the creditor. In February, 1898, the trustee applied under s. 82, sub-s. 1, of the Act to the Board of Trade for his release. In March, 1898, he paid a dividend, and in the list of proofs transmitted to the Board of Trade marked the proof as "disallowed." In April and May, 1898, he received letters written on behalf of the creditor asking in effect when the claim would be settled, but in the bonâ fide belief that the proof had been properly dealt with and disallowed he did not answer the letters nor inform the Board of Trade that he had received them. In June, 1898, the trustee obtained his release under s. 82, sub-s. 2. In July the creditor communicated with the Board of Trade, who thereupon applied to the trustee for an explanation. Some correspondence ensued, and in January, 1899, the Board of Trade revoked the order of release on the ground that it had been obtained by the suppression or concealment of material facts. The trustee appealed:—

Held, (1) that the words "suppression or concealment of any material fact" must be read to mean such suppression or concealment as has in it an element of fraud; (2) that on the evidence the trustee had not wilfully withheld information from the Board of Trade, and that under the circumstances the order of the Board revoking his release must be discharged, but without costs. *In re* HARRIS. *Ex parte* HASLUCK **Wright J. 97**

13. —— *Undischarged Bankrupt — After-acquired Property—Personal Earnings—Game of Skill — Wagering Contract — Stakes claimed by Trustee in Bankruptcy—Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 18—*Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 53.

An undischarged bankrupt played a match at billiards for 100*l.* a side, the money being deposited with stakeholders. The bankrupt won, and both he and his trustee in bankruptcy claimed the 200*l.* in the hands of the stakeholders, who thereupon paid the money into court:—

Held, that, assuming the stakes were recoverable by the bankrupt from the stakeholders by action at law, they were property of the bankrupt which passed to his trustee under s. 44 of the Bankruptcy Act, 1883.

But *held*, that the stakes being money payable under a wagering contract, which was null and void under the Gaming Act, 1845, were irrecoverable by the bankrupt, and that his trustee had no better title:

Held, further, that, notwithstanding s. 1 of the Gaming Act, 1892, the bankrupt could recover back his deposit of 100*l.*, which was his own money, and therefore that this deposit belonged to his trustee.

Diggle v. *Higgs*, (1877) 2 Ex. D. 422, followed. SHOOLBRED *v.* ROBERTS - **Phillimore J. 560**

14. —— *Voluntary Settlement—Gift of Jewels and Money—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

Gifts of personal property made by a bankrupt within two years of his bankruptcy, without restricting the donee's power of alienation, but with intention that the donee shall use or retain the property for an indeterminate time, are voluntary settlements within the meaning of s. 47 of the Bankruptcy Act, 1883, and void as against the trustee in bankruptcy, but without prejudice to any sale or disposition of the property made by the donee before the bankruptcy in good faith and without notice of an available act of bankruptcy. But the donee may have to account for the proceeds of any such sale or disposition remaining in his hands at the commencement of the bankruptcy. *In re Player*, (1885) 15 Q. B. D. 682, and *In re Vansittart*, [1893] 1 Q. B. 181. *In re* TANKARD. *Ex parte* THE OFFICIAL RECEIVER - - - - **Wright J. 57**

—— Claim for maliciously presenting a bankruptcy petition without alleging special damage - - - - **106**
See PRACTICE. 6.

BANKRUPTCY RULES, 1886, Rule 353 - 549
See BANKRUPTCY. 4.

BEERHOUSE—Licence—"Real resident holder and occupier" - - - **294**
See LICENSING ACTS. 1.

BETTING—In streets—By-law—Statutory enactment—Repugnancy - - **34**
See GAMING. 1.

—— Place "used" for—Bar of public-house **380**
See GAMING. 2.

BILL OF EXCHANGE—Cheque—Defective title—Liability of banker—"Customer"
See BANKER. **172**

BILL OF LADING—Loss of bill of lading freight—Waiver of lien for chartered freight
See INSURANCE, MARINE. 2. **178**

BILL OF SALE—*Validity—Covenant to produce "when called upon" last Receipt for Rent, Rates and Taxes—Power to seize on Breach of any Covenant—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9.

By a bill of sale the grantor covenanted (inter alia) to produce "when called upon" the last receipt for the rent, rates and taxes of the premises where the chattels were; and the deed provided that the chattels thereby assigned

BILL OF SALE—*continued.*
should not be liable to seizure or to be taken possession of by the grantee for any cause other than those specified in s. 7 of the Bills of Sale Act, 1882 (the section being set out); and then followed a further proviso that if the chattels thereby assigned should be seized or taken possession of by the grantee "in consequence of the breach of any of the covenants therein contained," he should be at liberty to sell the same. The trustee in bankruptcy of the grantor contended that the bill of sale was void because the second proviso enabled the grantor to seize on non-production of receipts for rent, &c., on an oral demand, whereas the Act requires the demand to be made in writing:—
Held, that the deed considered as a whole substantially complied with the provisions of the Act, and was valid. *In re* BULLOCK. *Ex parte* WARD - - - - Wright J. 517

BOARD OF TRADE—Revocation by—Release of trustee—Error in administration 97
See BANKRUPTCY. 12.

BOARD OF TRADE BANKRUPTCY REGULATIONS, May, 1888 - - - 145
See BANKRUPTCY. 9.

BREACH OF COVENANT—Before assignment—Lease—Covenant by assignee to indemnify assignor - - - 148
See LANDLORD AND TENANT. 3.

BROKER—Stock Exchange—Surplus in hands of official assignee of—Title of trustee in bankruptcy - - - 555
See BANKRUPTCY. 11.

BUILDINGS—Public-house—Part of building used for dwelling-house—Approaches
See LONDON. 1. 193

—— Water tower—Effect of Public Health Acts on subsequent special water company's Act—By-laws - - - 664
See LOCAL GOVERNMENT. 1.

—— Wooden structure—Structure used in connection with traffic of railway - 277
See LONDON. 2.

BY-LAW—Betting in streets—Statutory enactment—Repugnancy - - 34
See GAMING. 1.

—— Water tower—Effect of Public Health Acts on subsequent special water company's Act - - - - - 664
See LOCAL GOVERNMENT. 1.

CARGO—In frozen condition—Full and complete cargo—Decrease of amount that could be stowed - - - - 364
See SHIPPING. 2.

CASES:—*Blyth and Fanshawe, In re*, (1882) 10 Q. B. D. 207, distinguished - 488
See PRACTICE. 2.

—— *Combined Weighing and Advertising Machine Co., In re*, (1889) 43 Ch. D. 99, considered - - - - 428
See PRACTICE. 1.

CASES—*continued.*
—— *Comfort* v. *Betts*, [1891] 1 Q. B. 737, distinguished - - - - 613
See ASSIGNMENT.

—— *Corn* v. *Matthews*, [1893] 1 Q. B. 310, distinguished - - - - 1
See INFANT.

—— *Diggle* v. *Higgs*, (1877) 2 Ex. D. 422, followed - - - - 560
See BANKRUPTCY. 13.

—— *Edwards* v. *Steel*, [1897] 2 Q. B. 327, dicta in, followed - - - - 217
See SHIPPING. 5.

—— *Lacey, In re*, (1884) 13 Q. B. D. 128, distinguished - - - - 549
See BANKRUPTCY. 4.

—— *Last* v. *London Assurance Corporation*, (1885) 10 App. Cas. 438, considered 439
See REVENUE. 6.

—— *M'Carthy, In re*, (1881) 7 L. R. (Ir.) 473, approved and followed - - 566
See BANKRUPTCY. 3.

—— *Morris* v. *Edwards*, (1890) 15 App. Cas. 309, followed - - - - 478
See PRACTICE. 3.

—— *New York Life Insurance Co.* v. *Styles*, (1889) 14 App. Cas. 381, considered - 439
See REVENUE. 6.

—— *Player, In re*, (1885) 15 Q. B. D. 682, commented on - - - - 57
See BANKRUPTCY. 14.

—— *Scott* v. *Morley*, (1887) 20 Q. B. D. 120, referred to - - - - 419
See HUSBAND AND WIFE.

—— *Smith* v. *Baker & Sons*, [1891] A. C. 325, followed - - - - 338
See EMPLOYER AND WORKMAN. 4.

—— —— v. *Webster*, (1876) 3 Ch. D. 49, discussed - - - - 414
See CONTRACT. 2.

—— *Stapleton, Ex parte*, (1879) 10 Ch. D. 586, not followed - - - 566
See BANKRUPTCY. 3.

—— *Tancred* v. *Delagoa Bay Ry. Co.*, (1889) 23 Q. B. D. 239, distinguished - 613
See ASSIGNMENT.

—— *Vansittart, In re*, [1893] 1 Q. B. 181, commented on - - - - 57
See BANKRUPTCY. 14.

CHAMBERS—Judge at—Jurisdiction—Costs of inquiry before Incorporated Law Society
See SOLICITOR. 2. 103

CHARGING ORDER—For costs—Property of persons not employing solicitor—Probate action - - - - 167
See SOLICITOR. 1.

—— Solicitor's lien—Costs—Set-off of judgments
See PRACTICE. 5. 498

CHARTERPARTY—Full and complete cargo—Cargo in frozen condition—Decrease of amount that could be stowed - 364
See SHIPPING. 2.

CHARTERPARTY—*continued.*
—— Salvage services—Division of sum awarded for—Construction of charterparty 690
See SHIPPING. 1.

CHEAP TRAINS — Duty — Exemption — Third-class passengers—Extra charge for reserved carriage - - - - 267
See RAILWAY. 2.

CHEQUE—Defective title—Liability of banker—"Customer" - - - - 172
See BANKER.

COAL—Delivery of ticket—Insertion of seller's name—Name under which seller trades
See WEIGHTS AND MEASURES. 1. 94

COMPANY—Contract to take shares in—Proof for injury caused by disclaimer by trustee in bankruptcy — Measure of damages - - - - 579
See BANKRUPTCY. 7.
—— Forfeiture—Reasonable notice before action for—Condition against liquidation 79
See LANDLORD AND TENANT. 2.
—— Shares — Stamp — Agreement for sale of equitable interest — "Conveyance on sale" - - - - 7
See REVENUE. 7.
—— Winding-up—Creditor—Attachment of debt—Garnishee order—Judgment - 428
See PRACTICE. 1.

COMPENSATION—Improvements — Agricultural holdings—Right of tenant to compensation under agreement - - 618
See LANDLORD AND TENANT. 1.
—— Workmen's Compensation Act.
See Cases under EMPLOYER AND WORKMAN.

CONCEALMENT—Identity of lender—Fraud—Right of borrower to repudiate - 641
See CONTRACT. 1.

CONSENT ORDER—Dismissing action with costs—"Judgment obtained" by defendants
See PUBLIC AUTHORITIES. 282

CONTRACT—*Loan of Money—Fraud — Concealment of Identity of Lender—Right of Borrower to Repudiate.*

The plaintiff, a money-lender, advertised under a fictitious name, and the defendant borrowed money and gave a promissory note to secure the sum borrowed and interest. In an action on the promissory note the jury found that the plaintiff intentionally concealed his identity to induce the defendant to borrow money of him as if from another, and that the defendant was so induced; that the plaintiff did so fraudulently; that the defendant entered into the contract believing that he was doing so with a person of the fictitious name given by the plaintiff, and that the defendant repudiated the contract within a reasonable time after he discovered that the plaintiff was the person with whom he had contracted:—

Held, that the fraudulent concealment by the plaintiff of his identity with a person whose reputation in business was such that the defendant would not have dealt with him was material to the inducement which brought about the contract, which the defendant was therefore entitled to repudiate within a reasonable time after the discovery of the fraud. GORDON *v.* STREET C. A. 641

2. —— *Memorandum in Writing—Signature by Agent "thereunto lawfully authorized"—Principal and Agent—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.

A letter written by an agent within the scope of his authority, which refers to and recognises an unsigned document as containing the terms of a contract made by his principal, is a sufficient memorandum of the contract within the 4th section of the Statute of Frauds, and it is not necessary, in order to satisfy the statute, that the principal should have authorized the agent to sign the letter as a record of the contract.

Smith v. *Webster*, (1876) 3 Ch. D. 49, discussed. JOHN GRIFFITHS CYCLE CORPORATION *v.* HUMBER & Co. - - - - - C. A. 414
—— By agent in name of principal, but for his own benefit—Ratification by principal
See PRINCIPAL AND AGENT. 66
—— Induced by fraud of bankrupt—Election by vendor to affirm contract — Right of trustee to redeem security at value assessed in petition - - 549
See BANKRUPTCY. 4.
—— Infant—Not for benefit of—Apprenticeship deed - - - - - 1
See INFANT.
—— To take shares—Proof for injury caused by disclaimer by trustee in bankruptcy—Measure of damages - - 579
See BANKRUPTCY. 7.
—— Widow—Action against, on contract made during coverture—Form of judgment
See HUSBAND AND WIFE. 419

CONTRACTOR — Independent contractor — Liability of employer—Dangerous work on highway—Collateral negligence - 392
See NEGLIGENCE. 1.
—— Negligence of—Public body—Contract to execute works—Liability of employer
See NEGLIGENCE. 2. 72
—— Undertakers and contractor—Indemnity as between respondents—Notice of claim—Workmen's compensation - - 521
See EMPLOYER AND WORKMAN. 1.

CONVERSION — Estoppel — Proximate cause of loss—Liability of warehouseman 205
See TROVER.

CONVEYANCE—Stamp duty—Shares — Agreement for sale of equitable interest 7
See REVENUE. 7.

CONVEYANCING AND LAW OF PROPERTY—Forfeiture — Reasonable notice before action for—Condition against liquidation - - - - - 79
See LANDLORD AND TENANT. 2.

COPYHOLD—*Fine on Admittance—Limitation of Action—Point from which Time begins to Run—Civil Procedure Act*, 1833 (3 *& 4 Will.* 4, *c.* 42), *s.* 3.

The lord of a manor was entitled to an

COPYHOLD—*continued.*
arbitrary fine on the admittance of a tenant to copyhold. He brought an action for the fine more than six years after the admittance, but less than six years from the assessment and demand of the fine:—
Held, that the period of limitation began to run from the time of the admittance, and that the lord's right was therefore barred by 3 & 4 Will. 4, c. 42, s. 3. MONCKTON *v.* PAYNE
A. L. Smith L.J. 603

CO-RESPONDENT—Bankruptcy of—Damages in the Divorce Court—Provable debt—Judgment summons - - 62
See BANKRUPTCY. 8.

COSTS—Appeal—Trustee in bankruptcy - 566
See BANKRUPTCY. 3.

—— Charging order for—Property of persons not employing solicitor—Probate action
See SOLICITOR. 1. 167

—— Inquiry before Incorporated Law Society—Jurisdiction—Judge at chambers 103
See SOLICITOR. 2.

—— "Judgment obtained" by defendants—Consent order dismissing action with costs - - - - - 282
See PUBLIC AUTHORITIES.

—— Payment into court by one defendant—Verdict for less than amount paid in—Liability of other defendant for costs
See NEGLIGENCE. 2. 72

—— Shorthand notes—Patent action—Solicitor and client - - - - 488
See PRACTICE. 2.

—— Solicitor's lien—Charging order—Set-off of judgments - - - 498
See PRACTICE. 5.

—— Summons—Unwholesome meat—Findings of arbitrator - - - 286
See LOCAL GOVERNMENT. 2.

—— Troops summoned to preserve the peace—Expenses of maintenance—Liability
See COUNTY COUNCIL. 26

COUNTY COUNCIL—*Troops summoned to Preserve the Peace—Expenses of Maintenance—Liability—Mandamus—Local Government.*
Troops were brought into a county, on the application of the county magistrates, for the purpose of suppressing riots, and preserving peace and order in the county. By agreement with the magistrates certain tradesmen supplied the troops with food and lodging while quartered in the county.
On an application for a mandamus to the county council to pay for the food and lodging supplied:—
Held, affirming the judgment of the Divisional Court, [1899] 2 Q. B. 26, that no duty was imposed by law on those who administered the county funds to pay the expenses of the maintenance of the troops, and a mandamus could not be granted. THE QUEEN *v.* GLAMORGAN COUNTY COUNCIL - - - C. A. 536

—— Licence—Exemption—Wooden structure used in connection with traffic of railway - - - - - 277
See LONDON. 2.

COVENANT—Bill of sale—Validity—Covenant to produce "when called upon" last receipt for rent, rates and taxes - 517
See BILL OF SALE.

—— Not to assign or underlet—Forfeiture—Reasonable notice before action for 79
See LANDLORD AND TENANT. 2.

—— To repair—Mesne assignment—Breach of covenant before assignment—Liability
See LANDLORD AND TENANT. 3. 148

CREDITOR—Assignment of dividend—Right of assignee to demand payment from trustee - - - - 50
See BANKRUPTCY. 1.

—— Execution—Tools of trade—Levy by sheriff—Small Debts Act - - 54
See BANKRUPTCY. 2.

CRIMINAL LAW—*Restitution of Stolen Property—Current Coin of the Realm—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 100.
A coin which is current coin of the realm may be sold as a curiosity, and in such a case, if the seller is a thief who has stolen it from the owner and who has subsequently been prosecuted to conviction, an order for its restitution to the owner may be made under s. 100 of the Larceny Act, 1861:—
Semble, that no such order could be made if the coin had been passed into circulation as current money, although it might be possible to identify it.
A thief stole from the respondent a five-pound gold piece (which by Royal proclamation had been made current coin of the realm) and changed it with the appellant, who was a dealer in curiosities, for five sovereigns:—
Held, that under the circumstances the coin had not been received by the appellant as current coin, and that an order might be made under s. 100 of the Larceny Act, 1861, ordering the appellant to restore it to the respondent. MOSS *v.* HANCOCK - - - - **Div. Ct. 111**

"CUSTOMER"—Cheque—Defective title—Liability of banker - - - 172
See BANKER.

CUSTOMS AND INLAND REVENUE.
See REVENUE.

DAMAGES—Divorce Court—Bankruptcy of co-respondent—Provable debt—Judgment summons - - - - 62
See BANKRUPTCY. 8.

—— Measure of—Contract to take shares—Proof for injury caused by disclaimer by trustee in bankruptcy - - 579
See BANKRUPTCY. 7.

DEBT—Attachment of—Garnishee order, action upon—Judgment—Company—Winding-up—Creditor - - - 428
See PRACTICE. 1.

—— Executor—Payment of assets to official receiver without retaining debt—Mistake - - - - - 347
See BANKRUPTCY. 5.

DEBT—*continued.*

—— Security—Power to assignee to sue in name of assignor—Absolute assignment 613
See ASSIGNMENT.

DEBTORS ACT—Damages in the Divorce Court—Bankruptcy of co-respondent—Provable debt—Judgment summons - 62
See BANKRUPTCY. 8.

DEDUCTION — Income tax from interest and annuities - - - - 226
See REVENUE. 5.

DELAY—Policy—Clause allowing deviation at premium to be arranged - 530
See INSURANCE, MARINE. 1.

DEVIATION—Policy—Delay—Clause allowing deviation at premium to be arranged
See INSURANCE, MARINE. 1. 530

DISCLAIMER—Contract to take shares—Proof for injury caused by disclaimer by trustee in bankruptcy — Measure of damages - - - - 579
See BANKRUPTCY. 7.

DISCOVERY—Affidavit of documents—Production—Matter tending to impeach case of party claiming privilege - - 478
See PRACTICE. 3.

DISCRETION—Justices — Licence — Offences — Application by owner for authority to carry on business - - - 607
See LICENSING ACTS. 7.

DIVIDEND—Right of assignee to demand payment from trustee—Creditor - 50
See BANKRUPTCY. 1.

DIVORCE—Damages—Bankruptcy of co-respondent—Provable debt—Judgment summons - - - - 62
See BANKRUPTCY. 8.

DOCK — Ship unloading in — Workmen's Compensation Act - - - 142
See EMPLOYER AND WORKMAN. 7.

DOCUMENTS—Affidavit of—Production—Matter tending to impeach case of party claiming privilege—Discovery - - 478
See PRACTICE. 3.

DRAIN—Nuisance by sewerage — Drainage of houses—Want of structural convenience —Liability of owners - - 41
See LOCAL GOVERNMENT. 3.

—— Volunteer corps—Storehouse and drill-hall —Metropolis Management Acts — Exemptions - - - - 474
See VOLUNTEERS.

DUTY—Public revenue.
See REVENUE.

—— Exemption—Third-class passengers—Extra charge for reserved carriage - 267
See RAILWAY. 2.

EMPLOYER AND WORKMAN—*Compensation—Average Weekly Earnings—Break in Employment—Injury to Workman resulting in Death—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clause* 1 (*a*), (i.)—*Indemnity as between Respondents—Undertakers and Contractor—Notice of Claim—Workmen's Compensation Act*, 1897, *s.* 4—*Workmen's Compensation Rules*, 1898, *rr.* 19–23.

A workman met with an accident which incapacitated him from work for eleven months; he then went back to work with the same master, being employed on a different class of work and at lower wages. About eighteen months after resuming work he met with a fatal accident arising out of and in the course of his employment:—

Held, that, in ascertaining the workman's average weekly earnings for the purpose of assessing the compensation payable to his dependants under Sched. I., clause 1 (*a*), (i.), of the Workmen's Compensation Act, 1897, regard could only be had to the period of employment between his return to work and the date of the accident, and that, this period being less than three years, the amount of compensation was 156 times his average weekly earnings during that period:

Held, further, that where the undertakers and a contractor with them are made respondents to an application for compensation under the Act, and the undertakers claim under s. 4 of the Act to be entitled to an indemnity against the contractor, they must, under rule 23 of the Workmen's Compensation Rules, 1898, file a notice of such claim five clear days before the day of hearing in the same manner as is prescribed by rule 19 in the case of a claim for indemnity by a respondent against a third party. APPLEBY *v.* HORSELEY COMPANY - - - C. A. 521

2. —— *Compensation—Average Weekly Earnings—Break in Employment—Strike—Personal Injury by Accident—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clause* 1 (*b*).

By Sched. I., clause 1, of the Workmen's Compensation Act, 1897, "The amount of compensation under this Act shall be . . . . (*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

A workman was employed by a firm of coal-owners from October 3, 1897, to March 31, 1898, when the workman went out on strike and the contract of employment was duly determined by notice. He remained on strike for five months, and on September 12, 1898, again entered the service of the same employers under a fresh contract of employment containing different terms; on October 3, 1898, he was injured by an accident arising out of and in the course of his employment:—

Held, that the period of employment contemplated by Sched. I., clause 1 (*b*), was a substantially continuous employment during which the relation of master and servant substantially existed between the employer and workman, and that therefore, in ascertaining the

EMPLOYER AND WORKMAN—*continued.*

workman's average weekly earnings, regard could only be had to the period of employment between the end of the strike and the date of the accident, the employment before the strike having been duly determined by the act of the parties. JONES *v.* OCEAN COAL COMPANY - - **C. A. 124**

3. —— *Compensation — Engineering Work — Employment on, in, or about — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

By s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, that Act applies (inter alia) to employment on, in, or about an engineering work; and by s. 7, sub-s. 2, "engineering work" is defined to mean any work of construction or alteration or repair of (inter alia) a harbour.

A harbour was being dredged by a steam dredger belonging to the harbour commissioners, the mud being discharged from the dredger into hoppers which, when full, were taken by a tug out to sea and there emptied, the workmen employed by the commissioners on the dredger going on the hoppers for that purpose. One of the workmen so employed by the commissioners on the dredger went in his turn on a hopper full of mud to sea to help in discharging it, and when about a mile and a half out at sea was knocked overboard owing to the swell and drowned:—

Held, that at the time of the accident the workman was not employed on, in, or about an engineering work within the meaning of s. 7 of the Act. CHAMBERS *v.* WHITEHAVEN HARBOUR COMMISSIONERS - - - - **C. A. 132**

4. —— *Compensation—Negligence—Defect in Plant or Machinery—Knowledge of Workman—Risk voluntarily incurred—"Volenti non fit injuria."*

While a workman was in the course of his employment descending from an elevated tramway belonging to his employers, his foot slipped, and he fell to the ground, receiving injuries which caused his death. The employers had provided no ladder or other safe means of ascending to and descending from the tramway. In an action brought by the widow of the deceased against his employers under the Fatal Accidents Act, 1846, to recover damages in respect of his death, the jury found (1) that the defendants had not exercised due care to have the tramway in a safe and proper condition so as to protect their servants working upon it against unnecessary risks; (2) that it was dangerous to descend from the tramway without a ladder; (3) that the deceased had the same means of knowing that it was dangerous as the defendants had; and (4) that the deceased did know that it was dangerous:—

Held, that, in the absence of any finding by the jury that the deceased had agreed to undertake the risk of descending from the tramway without a ladder or other safe means of descent, the plaintiff was entitled to judgment upon the findings of the jury.

Smith v. *Baker & Sons*, [1891] A. C. 325, discussed and followed. WILLIAMS *v.* BIRMINGHAM BATTERY AND METAL COMPANY - **C. A. 338**

5. —— *Compensation—Partial Incapacity—Accident causing Personal Injury — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched I., clause* 1 (*b*). *clause* 2.

The sole test of the right of a workman to a weekly payment under Sched. I., clause (*b*), of the Workmen's Compensation Act, 1897, in respect of partial incapacity for work, is his wage-earning capacity after the accident which caused the injury in respect of which compensation is sought. Where therefore a workman, although put to a different class of work after the accident, receives from his employers the same wages that he previously received from them, he is not entitled to a weekly payment in respect of partial incapacity after his return to work, his right to compensation being limited to a weekly payment in respect of total incapacity (after the second week) during his absence from work occasioned by the accident. IRONS *v.* DAVIS & TIMMINS, LIMITED - - - **C. A. 330**

6. —— *Compensation—Partial Incapacity—Personal Injury—Disablement from Earning Full Wages at Work at which employed—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 2 (*a*).

A workman was employed as foreman in a carpet-weaving factory; his principal duty was to supervise the hands, but he also to the knowledge of his employer used to set up and adjust the machines. While adjusting a machine he received an injury necessitating the amputation of his thumb; he continued however to attend regularly to his work, only absenting himself from the factory for a sufficient time to enable him to have his hand dressed. He was incapacitated by the accident from setting up and adjusting the machines, and his work was afterwards confined to the supervision of the hands. His employer continued to pay his wages at the same rate after as before the accident; but it was admitted that, should he leave his employer's service, his wage-earning power as a foreman in any other factory would be materially decreased:—

Held, that as the workman had been prevented by reason of the accident from doing a substantial part of the work at which he had previously earned his wages, he had been disabled for two weeks from earning full wages "at the work at which he was employed" within the meaning of s. 1, sub-s. 2 (*a*), of the Workmen's Compensation Act, 1897:—

Held, further, that, as the workman had hitherto suffered no pecuniary loss, the proper course was to make a declaration of the liability of the employer, leaving the amount and duration of the compensation to be fixed upon an application under Sched. I., clause 12, to vary the award, should the workman at any future time be unable by reason of the accident to earn the same wages. CHANDLER *v.* SMITH - **C. A. 506**

7. —— *Compensation—Ship Unloading in Dock — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A workman employed on board a ship lying in dock is not employed on, in, or about a dock, and is therefore not employed on or in or about a factory within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, whether

EMPLOYER AND WORKMAN—*continued.*
the dock itself is a factory within the meaning of sub-s. 2 of that section or not. FLOWERS *v.* CHAMBERS - - - - C. A. 142

8. —— *Compensation—Unsuccessful Action against Employer—Accident causing Personal Injury—Right to Assessment of Compensation under Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1. *sub-ss.* 2 (*b*), 4.

Where a workman, who has been injured by an accident arising out of and in the course of his employment, brings an unsuccessful action to recover damages against his employer, and is desirous of having compensation for his injury assessed under the Workmen's Compensation Act, 1897, he must follow the procedure prescribed by s. 1, sub-s. 4, of that Act, and must apply then and there to the judge trying the action for an assessment of compensation; he cannot at a subsequent date initiate independent proceedings against his employer by a request for arbitration under that Act. EDWARDS *v.* GODFREY - - - - C. A. 333

9. —— *Compensation—Wharf—Employment on, in, or about a Factory—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A wharf at the side of a canal, on which no machinery is used, is not a factory within the meaning of s. 7 of the Workmen's Compensation Act, 1897, unless it is a wharf to which some provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. HALL *v.* SNOWDEN, HUBBARD & Co. - - C. A. 136

10. —— *Compensation—Workman going to Work—Accident arising out of and in Course of Employment—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

A firm of contractors, under a contract with a railway company for the widening of their line, were ballasting a siding which was separated from the main line by several lines of rail. The siding could only be reached by walking for a considerable distance through the premises of the railway company, and the workmen were advised by the contractors, with the authority of the railway company, to enter the premises by a gate, from which a path led by the side of the railway to the siding which was being ballasted; it was not necessary, while following this route, to go upon the main line. On a foggy morning, seven minutes before the hour for the commencement of the day's work, a workman in the employ of the contractors, while on his way to his work at the siding, was run over and killed on the main line about 150 yards from the locality of his work:—

Held, by A. L. Smith L.J. and Vaughan Williams L.J. (Romer L.J. dissenting), that it was no part of the contract of employment that the employment should include the time taken in getting to and from the work, that under the circumstances the contractors owed no duty to the workman while proceeding to his work, and that therefore the accident did not arise out of and in the course of the employment of the workman within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897.

Per A. L. Smith L.J. A workman who is

EMPLOYER AND WORKMAN—*continued.*
injured in a place not under his employer's control while going to or returning from his work is not within the provisions of the Workmen's Compensation Act, 1897. HOLNESS *v.* MACKAY & DAVIS - - - C. A. 319

—— Independent contractor—Liability of employer—Dangerous work on highway—Collateral negligence - - 392
See NEGLIGENCE. 1.

—— Infant—Contract not for benefit of—Apprenticeship deed - - - 1
See INFANT.

ENGINEERING WORK—Employment on, in, or about—Workmen's Compensation Act
See EMPLOYER AND WORKMAN. 3. 132

ESTATE DUTY - - 238, 245, 253, 595
See REVENUE. 1—4.

ESTOPPEL—Conversion—Proximate cause of loss—Liability of warehouseman 205
See TROVER.

EXECUTOR—Retainer—Payment of assets to official receiver without retaining debt—Mistake - - - - 347
See BANKRUPTCY. 5.

EXECUTION CREDITOR—Sheriff, sale by—Rent in arrear—Lien—Priority—Payment by sheriff—Indemnity - - 566
See BANKRUPTCY. 3.

—— Tools of trade—Levy by sheriff—Small Debts Act - - - - 54
See BANKRUPTCY. 2.

EXEMPTION—Duty—Third-class passengers—Extra charge for reserved carriage 267
See RAILWAY. 2.

—— Licence of county council—Wooden structure used in connection with traffic of railway - - - - 277
See LONDON. 2.

—— Metropolis Management Acts—Volunteer corps—Storehouse and drill-hall 474
See VOLUNTEERS.

—— Rates—Land used as railway for public conveyance—Liverpool Corporation 197
See RAILWAY. 3.

FATAL ACCIDENTS—Transfer of action—Decree for limitation of liability in the Admiralty Division - - 502
See PRACTICE. 7.

FENCE—Liability to—Owner and occupier of adjoining land—Adjoining highway—Licensee of owner of soil - - 313
See RAILWAY. 1.

FINANCE ACT.
See REVENUE.

FINE—Admittance to copyhold—Limitation of action—Point from which time begins to run - - - - 603
See COPYHOLD.

FORESHORE—Claim of Crown to foreshore—Discovery—Matter tending to impeach case of party claiming privilege - 478
See PRACTICE. 3.

FORFEITURE—Condition against liquidation—Voluntary winding-up of company—Reasonable notice before action for forfeiture - - - - 79
See LANDLORD AND TENANT. 2.

FRANCHISE.
See PARLIAMENT.

FRAUD—Concealment of identity of lender—Right of borrower to repudiate - 641
See CONTRACT. 1.

—— Contract induced by fraud of bankrupt—Election by vendor to affirm contract—Right of trustee to redeem security at value assessed in petition - - 549
See BANKRUPTCY. 4.

FRAUDS, STATUTE OF—Memorandum in writing—Signature by agent "thereunto lawfully authorized" - - 414
See CONTRACT. 2.

FREIGHT—Loss of bill of lading freight—Waiver of lien for chartered freight 178
See INSURANCE, MARINE. 2.

—— Sacrifice of—General average - 356
See SHIPPING. 4.

FURNITURE—Policy on ship—What included under term "furniture" - - 401
See INSURANCE, MARINE. 3.

GAME—*Ground Game Act*, 1880 (43 & 44 *Vict.* c. 47)—*Whether Owner occupying his own Land can have Rights of Killing Ground Game under the Act.*

The owner of land granted to the plaintiff a lease of the exclusive right of sporting upon the land, and subsequently during the currency of the lease sold the freehold to the defendant, who entered into occupation of it. The defendant caused the rabbits on the land to be trapped, claiming as occupier a right to do so under the provisions of the Ground Game Act, 1880, whereupon the plaintiff brought an action for infringement of his exclusive right of sporting:—

Held, that the defendant, being the occupier, was entitled under the Ground Game Act to kill the ground game, none the less because he happened to be also the owner. ANDERSON *v.* VICARY - - - - Wright J. 436

GAMING—*Betting in Streets—Local Government—By-law—Statutory Enactment—Repugnancy—Metropolitan Streets Act*, 1867 (30 & 31 *Vict.* c. 134), *s.* 23.

A by-law made by the London County Council provided that no person should frequent and use any street or other public place for the purpose of betting, under a penalty. By s. 23 of the Metropolitan Streets Act, 1867, any three or more persons assembled together in any part of a street for the purpose of betting shall be deemed to be obstructing the street, and each of them shall be liable to a penalty:—

Held, that the by-law was not repugnant to s. 23, and was valid. WHITE *v.* MORLEY Div. Ct. 34

2. —— *Place "used" for Betting—Bar of Public-house—Betting Act*, 1853 (16 & 17 *Vict.* c. 119), *s.* 3.

A bookmaker was in the habit of attending at the bar of a licensed beerhouse daily at certain hours for the purpose of betting with persons resorting thereto, and he carried on there a business of ready-money betting with the knowledge and permission of the licensed occupier of the beerhouse. His hours of attendance at the beerhouse were known to his customers, who came there for the purpose of transacting betting business with him. The beerhouse keeper had no interest in the bets made, and the bookmaker had no interest in or control over the business of the beerhouse or the house itself:—

Held, that the bookmaker "used" the bar of the beerhouse for the purposes prohibited by the Betting Act, 1853. BELTON *v.* BUSBY AND WOODS Div. Ct. 380

—— Undischarged bankrupt—After-acquired property—Wagering contract—Stakes claimed by trustee - - - 560
See BANKRUPTCY. 13.

GARNISHEE—Attachment of debt—Judgment—Company—Winding-up—Creditor
See PRACTICE. 1. 428

GENERAL AVERAGE - - 356, 403
See SHIPPING. 3, 4.

GROUND GAME ACT, 1880—Whether owner occupying his own land can have rights of killing ground game under the Act
See GAME. 436

HIGHWAY—Dangerous work on—Independent contractor—Liability of employer—Collateral negligence - - - 392
See NEGLIGENCE. 1.

—— Fence—Liability to—Owner and occupier of adjoining land—Licensee of owner of soil - - - - - 313
See RAILWAY. 1.

HUSBAND AND WIFE—*Action against Widow on Contract made during Coverture—Form of Judgment.*

Where judgment is recovered in an action against a widow upon a contract entered into by her during coverture after the passing of the Married Women's Property Act, 1882, and before the passing of the Married Women's Property Act, 1893, the plaintiff is not entitled to a judgment in the ordinary form as though the defendant were a feme sole; he can only sign judgment in the form settled by the Court of Appeal in *Scott* v. *Morley*, (1887) 20 Q. B. D. 120, in an action against a married woman, with such verbal alterations as are necessary to adapt that form to a judgment against a widow. SOFTLAW *v.* WELCH C. A. 419

IDENTITY—Concealment of identity of lender—Fraud—Right of borrower to repudiate
See CONTRACT. 1. 641

IMPROVEMENTS—Agricultural holdings—Right of tenant to compensation under agreement - - - - 618
See LANDLORD AND TENANT. 1.

INCOME TAX—Annual profits or gains—Life insurance company—Participating policy-holders—Return of premium by way of bonus - - - - 439
See REVENUE. 6.

—— Deduction of income tax from interest or annuities - - - - 226
See REVENUE. 5.

—— Proof for assessed taxes—Power of Court to go behind assessment—Scheme of arrangement - - - - 145
See BANKRUPTCY. 9.

INCORPORATED LAW SOCIETY—Costs of inquiry before—Judge in chambers—Jurisdiction - - - - 103
See SOLICITOR. 2.

INDEMNITY—Lease—Covenant by assignee to indemnify assignor—Breach of covenant before assignment - - - 148
See LANDLORD AND TENANT. 3.

—— Workmen's compensation—Undertakers and contractor—Notice of claim - 521
See EMPLOYER AND WORKMAN. 1.

INFANT—*Apprenticeship Deed—Contract not for Benefit of Infant—Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90).

By a deed of apprenticeship of an infant it was provided that the apprentice should serve for a term of years, excepting the usual holidays and days on which the master's business should be at a standstill through accident beyond the control of the master, and that during the said term, excepting and subject as aforesaid, the master should pay the apprentice wages for her services:—

Held, that the provision that the master should not be liable to pay wages to the apprentice during the excepted period was not so disadvantageous to her as to render the apprenticeship deed incapable of being enforced against her under the Employers and Workmen Act, 1875.

Corn v. *Matthews*, [1893] 1 Q. B. 310, distinguished. GREEN *v.* THOMPSON - Div. Ct. 1

INFECTIOUS DISORDER—Public health—Order for removal - - - 191, 301
See JUSTICES. 1, 2.

INN—Licensing Acts.
See Cases under LICENSING ACTS.

—— Part of building used for dwelling-house——Approaches - - - 193
See LONDON. 1.

—— Place "used" for betting—Bar of public-house - - - - 380
See GAMING. 2.

INNKEEPER—Providing piano—Music—Public Health Act - - - - 121
See LICENSING ACTS. 3.

INSOLVENCY—Insolvent testator—Administration order—Official receiver—Vesting order, effect of - - - 347
See BANKRUPTCY. 5.

INSURANCE, LIFE—Income tax—Participating policy-holders—Return of premium by way of bonus—Annual profits or gains
See REVENUE. 6. 439

INSURANCE, MARINE — *Deviation — Delay—Policy—Clause allowing Deviation at Premium to be arranged.*

The plaintiffs insured with the defendants by a Lloyd's policy a box containing bullion "at and from Boodinni to London," in a P. & O. steamer, "including all risks of every description from the mines by escort to railway station at Raichur (forty miles) thence by rail (400 miles) to Bombay, thence to London." The policy contained a clause covering the assured "in the event of deviation or change of voyage at a premium to be hereafter arranged." At Raichur the station-master improperly refused to receive the box at other than owner's risk rate, and the official in charge of it took it for safety to the plaintiffs' head office at Secunderabad, 170 miles from Raichur, and off the route from that place to Bombay; the box was kept there for a month in the plaintiffs' safe while arrangements were being made with the railway company. The box was then taken to Raichur and forwarded by the prescribed route to London, where upon arrival a bar of gold was found to be missing; it had in fact been stolen while the box was in the plaintiffs' office at Secunderabad:—

Held, that the taking of the box to Secunderabad was a necessary act done in the prosecution of the insured journey, and was within the scope of the adventure; that the risk was always a transit risk; that the delay at Secunderabad was unreasonably long, and that there was at that place an unjustifiable deviation not covered by the premium paid, but that, being a deviation in the course of the voyage, it was covered by the deviation clause in the policy, and the defendants were therefore liable. HYDERABAD (DECCAN) COMPANY *v.* WILLOUGHBY
Bigham J. 530

2. —— *Lump Chartered Freight—Loss not by Perils insured against—Cesser of Liability Clause—Loss of Bill of Lading Freight—Waiver of Lien for Chartered Freight.*

Shipowners effected a policy of marine insurance on chartered freight under a charter-party, by which a ship was chartered for a voyage at a lump freight, and it was provided that the master should sign bills of lading at any rate of freight the charterers might require, but not under chartered rates, or difference to be settled in cash on signing bills of lading, that the charterers' liability should cease upon shipment of the cargo, provided the cargo was worth the freight, dead freight, and demurrage on arrival at the port of discharge, and that the vessel should have a lien on the cargo for recovery of all freight, dead freight, demurrage, and all other charges whatsoever. The charterers loaded the ship with a general cargo, and the master signed bills of lading, by which the goods mentioned in each bill of lading were made deliverable to the consignees thereof upon payment of the bill of lading freight in respect of those goods. The total amount of the bill of lading freight on the goods shipped exceeded the amount of the chartered freight. On the voyage the ship ran aground, and a certain portion of the cargo was in consequence jettisoned

INSURANCE, MARINE—*continued.*

or otherwise lost. The ship, having been floated again, ultimately completed her voyage with the remainder of the cargo, which was worth the freight, dead freight, and demurrage on arrival of the ship. Owing to the loss of cargo, as before mentioned, the amount of the bill of lading freight received by the shipowners was less than that of the chartered freight. The shipowners brought an action against the underwriters on the policy to recover the difference between the two amounts:—

Held, that the action was not maintainable, the loss not having been occasioned by a peril of the sea, but by the plaintiffs' own action in not so framing the bills of lading as to preserve to themselves their lien over the whole cargo for the chartered freight. BRANKELOW STEAMSHIP COMPANY *v.* CANTON INSURANCE OFFICE.

C. A. 178

3. —— *Policy on Ship—What included under term "Furniture."*

Where a ship is employed in the grain trade, and consequently requires to be furnished with separation cloths and dunnage mats for the proper carriage of her cargo under the ordinary circumstances of that trade, a time policy on the ship and its furniture will cover the cloths and mats, although on the particular voyage on which the loss occurs they are temporarily, owing to the special nature of the voyage, not in use, but stowed away in the forepeak. HOGARTH *v.* WALKER - - - Bigham J. 401

INTERROGATORIES—Action for slander 590
See PRACTICE. 4.

JUDGMENT—Claim to set aside judgment by default on the ground of fraud - 106
See PRACTICE. 6.

—— Consent order dismissing action with costs
See PUBLIC AUTHORITIES. 282

—— Form of — Widow — Action against, on contract made during coverture - 419
See HUSBAND AND WIFE.

JURISDICTION—Assignment of dividend—Right of assignee to demand payment from trustee - - - - 50
See BANKRUPTCY. 1.

—— Costs of inquiry before Incorporated Law Society—Judge in chambers - 103
See SOLICITOR. 2.

—— Infectious disorder—Order for removal—Public health - - - 301
See JUSTICES. 2.

—— Sale without licence—Disqualification from holding licence—Application by owner for authority to carry on business 154
See LICENSING ACTS. 6.

JUSTICES — *Infectious Disorder — Order for Removal of Patient — "Proper Lodging or Accommodation"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 124.

Sect. 124 of the Public Health Act, 1875, enables justices to order the removal to a hospital of any person suffering from a dangerous infectious disorder who is "without proper lodging or accommodation." Where it was proved that a person suffering from such a disorder had proper lodging and accommodation, so far as he himself was concerned, at his father's house, but that he could not be properly isolated and there would be danger of infection to the other inmates of the house if he remained there:—

Held, that there was evidence that he was "without proper lodging or accommodation" within the meaning of s. 124. WARWICK *v.* GRAHAM - - - - Div. Ct. 191

2. —— *Infectious Disease—Order for Removal to Hospital—Finality of Order—Jurisdiction—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 124.

The validity of an order for the removal to a hospital of a person suffering from a dangerous infectious disorder, made ex parte by a single justice under s. 124 of the Public Health Act, 1875, cannot be inquired into upon the hearing of a summons under that section before a court of summary jurisdiction for obstructing the execution of the order. THE QUEEN *v.* DAVEY

Div. Ct. 301

—— Apprenticeship deed — Contract not for benefit of infant - - - 1
See INFANT.

—— Betting—Place "used" for—Bar of public-house - - - - 380
See GAMING. 2.

—— Betting in streets — By-law — Statutory enactment—Repugnancy - - 34
See GAMING. 1.

—— Building—Part of, used for dwelling-house —Approaches - - - 193
See LONDON. 1.

—— Coal — Delivery of ticket — Insertion of seller's name—Name under which seller trades - - - - 94
See WEIGHTS AND MEASURES. 1.

—— Licensing Acts.
See LICENSING ACTS.

—— Nuisance by sewerage—Drainage by houses — Want of structural convenience — Liability of owners - - 41
See LOCAL GOVERNMENT. 3.

—— Rates—Exemption—Land used as railway for public conveyance—Liverpool Corporation - - - - 197
See RAILWAY. 3.

—— Restitution of stolen property—Current coin of the realm—Larceny - - 111
See CRIMINAL LAW.

—— Vaccination officer—Duty of guardians to appoint—Mandamus - - 632
See VACCINATION.

—— Water tower—Effect of Public Health Acts on subsequent special water company's Act—By-laws—Buildings - 664
See LOCAL GOVERNMENT. 1.

—— Waterworks—Rateable value—Works not directly earning profit—Cost of construction - - - - - 14
See POOR-RATE.

JUSTICES—*continued.*

—— Weight indicated exceeding weight of article sold—"False or unjust" - 673
See WEIGHTS AND MEASURES. 2.

—— Wooden structure used in connection with traffic of railway—Licence of county council - - - - 277
See LONDON. 2.

LANDLORD AND TENANT—*Compensation for Improvements—Agricultural Holdings (England) Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 57—*Right of Tenant to Compensation under Agreement.*

Sect. 57 of the Agricultural Holdings (England) Act, 1883, provides that "a tenant shall not be entitled to claim compensation by custom or otherwise than in manner authorized by this Act in respect of any improvement for which he is entitled to compensation under or in pursuance of this Act":—

Held, that this provision only applied to a tenant claiming compensation under the Act, and did not exclude the right of a tenant to claim, under an agreement outside the Act, compensation for improvements in respect of which he might have claimed compensation under the Act. *In re* PEARSON AND I'ANSON - Div. Ct. 618

2. —— *Forfeiture—Proviso for Re-entry—Condition against Liquidation—Winding up of Company—Condition running with the Land—Covenant not to Assign or Underlet—Notice before Action for Forfeiture—Reasonable Notice—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 1, 6—*Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 2, *sub-s.* 2.

A lease of premises to an individual and a joint stock company contained a covenant by the "lessees" (which expression was by the terms of the lease to include assigns where the context so required or admitted) to keep the premises in repair, and a proviso for re-entry for breach of covenant, or if the lessees should become bankrupt, or enter into liquidation for the benefit of, or compound with their creditors, or, being a company, should enter into liquidation, whether compulsory or voluntary.

The reversion on the lease was conveyed to the plaintiffs and the lease was assigned by the lessees with the plaintiffs' consent to the defendants, an individual and a joint stock company. The defendant company subsequently passed a resolution for a voluntary winding-up, not by reason of insolvency, but for the purpose of reconstruction with additional capital. The plaintiffs served upon the defendants a notice alleging as grounds of forfeiture under the proviso the liquidation, and also breaches of the covenant to repair of an extensive character, and requiring the defendants to remedy and make compensation for the same. Two days after service of the notice and within a year from the passing of the resolution for winding-up, the plaintiffs commenced an action against the defendants for recovery of the premises as upon a forfeiture. It was admitted by the plaintiffs at the trial that they could not rely on any of the alleged breaches of the covenant to repair:—

Held, that the defendant company had entered into liquidation within the meaning of the condition contained in the lease; and,

Semble, that the condition ran with the land.

But *held*, also, that a sufficient notice under s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, was a condition precedent to enforcing the forfeiture, the effect of s. 2, sub-s. 2, of the Conveyancing and Law of Property Act, 1892, being to take the case of a forfeiture on bankruptcy or liquidation out of sub-s. 6 of s. 14 of the Conveyancing and Law of Property Act, 1881, for a year from the date of the bankruptcy or liquidation; and that the notice given was not sufficient, and therefore the action was not maintainable.

A lease contained a covenant by the lessees for themselves and their assigns not to assign or underlet the premises without the consent of the lessors, which was not to be unreasonably withheld. Assignees of the lease entered into an agreement for the sale thereof by which it was provided that at a certain period, though the purchase might not then be completed, the purchasers should be let into possession of the premises, and should from that date pay the rents and outgoings in respect of the same. The purchasers were let into possession under that agreement, the purchase remaining uncompleted.

Held, that so letting them into possession was not a breach of the covenant against assignment or underletting without the consent of the lessors. HORSEY ESTATE, LIMITED *v.* STEIGER C. A. 79

3. —— *Repairs—Lease—Covenant to Repair—Mesne Assignment—Covenant by Assignee to indemnify Assignor—Breach of Covenant before Assignment—Liability.*

A lease, the reversion on which was vested in the plaintiff, contained a covenant by the lessee to repair and keep in repair the demised premises. By virtue of divers mesne assignments and other acts in the law the term had become vested in the defendants, the executors of a deceased assignee of the lease. They, as "trustees," assigned the premises, which were then out of repair, for the residue of the term to an assignee, who covenanted with them thenceforth to pay the rent reserved by the lease, and perform the lessee's covenants therein contained, and to keep them indemnified from the payment and performance thereof respectively. The premises remaining out of repair, the plaintiff subsequently brought an action against the defendants for breach of the covenant to repair, and they brought in their assignee as third party. The plaintiff having recovered damages against the defendants in the action:—

Held, that the third party was liable under his covenant to indemnify them against those damages. GOOCH *v.* CLUTTERBUCK. DAVIS (THIRD PARTY) - - - C. A. 148

—— Rent in arrear—Lien—Priority—Payment by sheriff—Indemnity - - 566
See BANKRUPTCY. 3.

LARCENY—Contract induced by fraud of bankrupt — Election by vendor to affirm contract—Right of trustee to redeem security at value assessed in petition
See BANKRUPTCY. 4. 549

LARCENY—*continued.*

—— Restitution of stolen property — Current coin of the realm - - - 111
See CRIMINAL LAW.

LEASE.
See LANDLORD AND TENANT.

LICENCE.
See LICENSING ACTS.

—— County council — Exemption — Wooden structure used in connection with traffic of railway - - - - 277
See LONDON. 2.

LICENSING ACTS—*Licence—Beerhouse—"Real Resident Holder and Occupier"—Beerhouse Act*, 1840 (3 & 4 *Vict. c.* 61), *s.* 1.

The mere fact that the tenant in occupation of a beerhouse carries on the sale of beer therein as the salaried employee of his landlords, a brewery company, to whom he is accountable for the profits, does not involve as a conclusion of law that he is not the real resident holder and occupier of the house within the meaning of s. 1 of the Beerhouse Act, 1840:—

So *held* by the Court of Appeal.

Objectors to the renewal of a licence have no right to be heard on an appeal to quarter sessions or in the High Court on a case stated by the quarter sessions:—

So *held* by the Divisional Court. NIX *v.* NOTTINGHAM JUSTICES - - C. A. 294

2. —— *Licence—Premises taken for Public Purpose—Application for Licence in respect of other Premises—Notice—Sufficiency—Justices proceeding on Insufficient Notice—Mandamus to Hear and Determine—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *s.* 7—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 40.

The holder of a licence in respect of a house about to be pulled down for a public purpose gave the notices required by s. 14 of the Alehouse Act, 1828, of his intention to apply for a licence in respect of another house not then licensed. The notices given did not comply with the provisions of s. 40 of the Licensing Act, 1872. The licensing justices at a special session granted the application upon information that the notices were in order. A rule nisi having been obtained for a writ of mandamus to the justices to hear and determine the application according to law:—

Held, by a Divisional Court, that the notices were not in order, and that the justices had acted without jurisdiction, but that, as they had heard and determined the application, a mandamus ought not to issue:

Held, by the Court of Appeal, that the notices were good, as the specific provisions with regard to them in s. 14 of the Alehouse Act, 1828, had not been expressly or impliedly repealed by s. 40 of the Licensing Act, 1872. THE QUEEN *v.* NICHOLSON - - - - C. A. 455

3. —— *Music—Innkeeper providing Piano—Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 51.

A licensed victualler had in the public smoke-room of his house a pianoforte on which customers were in the habit of playing for the amusement of themselves and others resorting to the room. He made no extra charge either for the use of the piano or for the entertainment thus afforded, nor did he pay or encourage the performers. He was convicted under s. 51 of the Public Health Acts Amendment Act, 1890, for having kept or used the room for public entertainment without a licence for the purpose:—

Held, that the conviction was wrong. BREARLEY *v.* MORLEY - - - Div. Ct. 121

4. —— *Offences—Falsely pretending to be a Traveller—Person Arriving at or Departing from Railway Station—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 25—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 10—*Sunday Closing (Wales) Act*, 1881 (44 & 45 *Vict. c.* 61), *s.* 4.

A person who, after taking a ticket at a railway station, obtains intoxicating liquor at the refreshment-room at the station during prohibited hours and then leaves by train, even though he took the ticket in order to obtain the intoxicating liquor before starting, cannot be convicted under s. 25 of the Licensing Act, 1872, of obtaining intoxicating liquor during closing hours by falsely representing himself to be a traveller, but is within the exemption in s. 10 of the Licensing Act, 1874, in favour of persons arriving at or departing from a railway station by railroad. WILLIAMS *v.* MACDONALD Div. Ct. 308

5. —— *Offences—Keeping Open during Prohibited Hours—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 9.

In order to constitute the offence of opening or keeping open licensed premises for the sale of intoxicating liquor during prohibited hours, within the meaning of s. 9 of the Licensing Act, 1874, there must be means of access to customers to the interior of the premises from the outside. If therefore the outer doors are closed at the closing hour, so as to prevent access from the outside, the offence of keeping open the premises during prohibited hours is not proved by evidence that customers, who were on the premises before closing time, remained there and were supplied with liquor afterwards, although such evidence might justify a conviction under the same section for selling intoxicating liquor during prohibited hours. JEFFREY *v.* WEAVER Div. Ct. 449

6. —— *Offences—Sale without Licence—Disqualification from holding Licence—Application by Owner for Authority to carry on Business—Jurisdiction to make Order—Licensing Acts*, 1872, 1874 (35 & 36 *Vict. c.* 94, *s.* 3; 37 & 38 *Vict. c.* 49, *s.* 15).

By the Licensing Act, 1872, s. 3, no person shall sell by retail intoxicating liquor without being licensed, subject to penalties, for the first offence of 50*l.* or one month's imprisonment, for the second offence of 100*l.* or three months, and in the case of a second offence, "he may, by order of the Court by which he is tried, be disqualified for any term not exceeding five years from holding any licence for the sale of intoxicating liquors."

By the Licensing Act, 1874, s. 15, "Where

LICENSING ACTS—*continued.*
any licensed person is convicted for the first time of" (inter alia) "selling spirits without a spirit licence, ... and in consequence either becomes personally disqualified or has his licence forfeited," the owner of the premises may apply for authority to carry on the business.

A licensed person was convicted, on the same day, of two separate offences, for selling spirits without a spirit licence on two different days, and on the second conviction was ordered to be disqualified from holding a licence. The owner applied for authority to carry on the business. The justices held that they had no jurisdiction to hear and determine the application.

On a case stated:—

Held, that the words, in s. 15 of the Act of 1874, "for the first time," govern the words "becomes personally disqualified or has his licence forfeited," as well as the words specifying the offences, and therefore the owner was entitled to apply, and the justices had jurisdiction to make an order. *Ex parte* FLINN & SONS
Div. Ct. 154

7. —— *Offences—Sale without Licence—Disqualification from holding Licence—Application by Owner for Authority to carry on Business—Beerhouse licensed before* 1869—*Limitation of Discretion of Justices to refuse Application—Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19; *Licensing Acts*, 1872, 1874 (35 & 36 *Vict. c.* 94, *s.* 3; 37 & 38 *Vict. c.* 49, *s.* 15).

The holder of a licence to sell beer to be consumed on and off the premises, which had been continuously in force from a date anterior to 1869, having forfeited this licence in consequence of his conviction for selling spirits without a licence, the owner of the premises applied to a court of summary jurisdiction, under s. 15 of the Licensing Act, 1874, for authority to carry on the same business on the same premises until the next special licensing sessions:—

Held, that the court of summary jurisdiction had no authority to refuse this application on any ground other than those specified in s. 8 of the Wine and Beerhouse Act, 1869. *Ex parte* FLINN & SONS (No. 2) - - - Div. Ct. 607

LIEN—Loss of bill of lading freight—Waiver of lien for chartered freight - 178
See INSURANCE, MARINE. 2.

—— Solicitor's—Charging order—Costs—Set-off of judgments - - - 498
See PRACTICE. 5.

LIFE INSURANCE—Income tax—Participating policy-holders—Return of premium by way of bonus—Annual profits or gains
See REVENUE. 6. 439

LIMITATION OF LIABILITY—Decree for, in the Admiralty Division—Transfer of action—Fatal accidents - - 502
See PRACTICE. 7.

LIMITATIONS, STATUTE OF—Fine on admittance — Limitation of action — Point from which time begins to run - 603
See COPYHOLD.

LIVERPOOL—Rates—Exemption—Land used as railway for public conveyance - 197
See RAILWAY. 3.

LOCAL GOVERNMENT — *Buildings — Water Tower—Effect of Public Health Acts on subsequent Special Water Company's Act—By-laws—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 93—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 157—60 & 61 *Vict. c. cxvii. (Local).*

Sect. 93 of the Waterworks Clauses Act, 1847, provides that nothing therein or in the special Act contained shall be deemed to exempt the undertakers "from any Act for improving the sanitary condition of towns and populous places which may be passed in the same session of Parliament in which the special Act is passed, or any future session of Parliament." A water company by their special Act, passed in 1897 and incorporating the Waterworks Clauses Act, 1847, were empowered to erect and maintain a water tower in a specified place. Shortly after the special Act came into force the local sanitary authority of the district, under the powers given by s. 157 of the Public Health Act, 1875, made by-laws providing that any person intending to erect a building should give the local authority notice of his intention and of the date on which the building was to be commenced, and to deliver to them plans and sections of it, and a description of the materials with which it was to be constructed. The special Act did not incorporate the Public Health Act, 1875, but contained no provisions inconsistent with s. 157 of that Act or with the by-laws:—

Held, with respect to the erection of the water tower authorized by the special Act, that s. 93 of the Waterworks Clauses Act, 1847, had not the effect of exempting the water company from the provisions of the Public Health Act, 1875, and that they were bound to comply with the by-laws made by the local sanitary authority under that Act. UCKFIELD RURAL COUNCIL *v.* CROWBOROUGH DISTRICT WATER COMPANY - Div. Ct. 664

2. —— *Offences—Unwholesome Meat—Damage by Reason of Seizure—Costs of Summons—"Full Compensation"—Arbitration—Findings of Arbitrator—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117, 308.

Meat belonging to the plaintiff and alleged to be unwholesome was seized by the inspector of nuisances of the defendant corporation and condemned by a magistrate. The owner was proceeded against, but the summons was dismissed by the justice for a defect in form, and no order was made as to costs. On an arbitration under the Public Health Act, 1875, the arbitrator found that the meat was sound, and awarded the plaintiff compensation. In an action on the award:—

Held, that the finding of the arbitrator as to the soundness of the meat was conclusive; that the corporation were liable to pay to the plaintiff full compensation for the damage sustained by reason of the acts of the officer of the corporation; and that such full compensation included the costs to which the plaintiff was put in opposing the summons. WALSHAW *v.* BRIGHOUSE CORPORATION - - - - - C. A. 286

3. —— *Sewers—Nuisance by Sewage—Drainage of Houses—Want of Structural Convenience—Liability of Owners — "Drain" — "Sewer" —*

LOCAL GOVERNMENT—*continued.*

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13, 15, 21, 94, 95.

The appellants were summoned by the sanitary authority of a borough for non-compliance with a notice to abate a nuisance caused by draining twelve houses, owned by the appellants, into a drain constructed beside a highway to receive the surface water of the highway, which emptied into an open ditch. According to the plan, deposited with the sanitary authority when the houses were built by the appellants' predecessor in title, the houses should have been drained into cesspools, but cesspools had not been constructed. No sewer had been constructed by the sanitary authority, by means of which the houses could be drained. The houses were separately occupied, and were not within the same curtilage. The justices made an order to abate the nuisance, by disconnecting the drains of the houses from the surface-water drain, and making cesspools for the houses.

On a case stated :—

Held, that the sanitary authority were not bound, under the Public Health Act, 1875, s. 15, to provide a sewer to drain the appellants' houses, that the surface-water drain, though for some purposes a "sewer," within the meaning of s. 4, was not a sewer into which the appellants were entitled to empty their drains, that the nuisance was caused by the want of a structural convenience, within the meaning of s. 94, and therefore the defendants, as owners, were liable. KINSON POTTERY COMPANY *v.* POOLE CORPORATION Div. Ct. 41

—— County council—Troops summoned to preserve the peace—Expenses of maintenance—Liability—Mandamus - 536
See COUNTY COUNCIL.

—— Streets — Betting in — By-law—Statutory enactment—Repugnancy - - 34
See GAMING. 1.

LONDON — *Buildings — Public-house — Part of Building used for Dwelling-house—Approaches — London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*) (*Local*), *s.* 74, *sub-s.* 2.

A fully licensed public-house is not a building "used in part for purposes of trade or manufacture and in part as a dwelling-house" within the meaning of s. 74, sub-s. 2, of the London Building Act, 1894; so that the means of approach to the part used as a dwelling-house need not be constructed of fire-resisting materials as required by that section. CARRITT *v.* GODSON & SON Div. Ct. 193

2. —— *Wooden Structure—Licence of County Council—Exemption—Structure used in Connection with Traffic of Railway Company—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 86.

The appellants, coal merchants, were in the habit of having coal consigned to them by railway to London, where it was delivered to them at a wharf in the coal yard of the railway company. By the permission of the railway company the appellants erected in the coal yard a small wooden structure which they used as a coal office. The use of this coal office by the appellants was a matter of convenience to the railway company in that it contributed to the speedy clearing of the coal trucks from the company's sidings :—

Held, that the structure in question was "used in connection with the traffic of the railway company," within the meaning of s. 86 of the London Building Act, 1894, and that its erection did not require the licence of the respondents under s. 84. ELLIOTT *v.* LONDON COUNTY COUNCIL - - - - Div. Ct. 277

—— Betting in streets — By-law — Statutory enactment—Repugnancy - - 34
See GAMING. 1.

—— Volunteer corps—Storehouse and drill-hall —Sewerage and drainage - - 474
See VOLUNTEERS.

MANDAMUS — Alternative remedy — Legal remedy—Duty of guardians to appoint vaccination officer - - - 632
See VACCINATION.

—— County council—Troops summoned to preserve the peace—Expenses of maintenance—Liability - - - 536
See COUNTY COUNCIL.

—— Licence—Application for—Justices proceeding on insufficient notice—Mandamus to hear and determine - - 455
See LICENSING ACTS. 2.

MARINE INSURANCE.
See INSURANCE, MARINE.

MASTER AND SERVANT — Infant — Contract not for benefit of — Apprenticeship deed - - - - - 1
See INFANT.

—— Receipt—Money received by servant on account of master and handed over to fellow-servant — Acknowledgment of receipt by fellow-servant - - 158
See REVENUE. 8.

—— Seaman—Termination of service abroad—"Passage home" - - - 217
See SHIPPING. 5.

—— Workmen's Compensation Act.
See Cases under EMPLOYER AND WORKMAN.

MATRIMONIAL CAUSES ACTS—Damages in the Divorce Court—Bankruptcy of co-respondent—Judgment summons 62
See BANKRUPTCY. 8.

MAXIM OF LAW—"Volenti non fit injuria" 338
See EMPLOYER AND WORKMAN. 4.

MEAT—Unwholesome—Findings of arbitrator—Costs of summons - - - 286
See LOCAL GOVERNMENT. 2.

MERCHANT SHIPPING — Seaman — Termination of service abroad — "Passage home" - - - - 217
See SHIPPING. 5.

—— Transfer of action—Fatal accidents—Decree for limitation of liability in the Admiralty Division - - - 502
See PRACTICE. 7.

METROPOLIS.
See LONDON.

METROPOLIS MANAGEMENT ACT—Exemptions—Volunteer corps—Storehouse and drill-hall - - - - - 474
See VOLUNTEERS.

MINE—Stamp—Receipt for compensation for not working coal adjacent to railway—Right of support - - - - - 652
See REVENUE. 9.

MISTAKE—Executor—Payment of assets to official receiver without retaining debt 347
See BANKRUPTCY. 5.

—— Occupiers' list—Notice of objection—Power of amendment - - - - 273
See PARLIAMENT.

MUSIC — Innkeeper providing piano — Public Health Acts - - - - 121
See LICENSING ACTS. 3.

NEGLIGENCE — *Independent Contractor — Liability of Employer—Dangerous Work on Highway —Collateral Negligence.*

The defendants, a telephone company, were lawfully engaged in laying telephone wires along a street. They passed the wires through tubes which they laid in a trench under the level of the pavement. The defendants contracted with a plumber to connect these tubes at the joints with lead and solder to the satisfaction of the defendants' foreman at the sum of 12s. per joint. There was evidence that the work was done by the plumber under the supervision of the defendants' foreman, and that one of their men was assisting him in it. In order to make the connections between the tubes, it was necessary to obtain a flare from a benzoline lamp, which could not be done without the application of heat to the lamp. The lamp used for the purpose was provided with a safety-valve. The plumber, for the purpose of obtaining the necessary flare, dipped the lamp into a caldron of melted solder, which was placed over a fire on the footway for the purpose of the work, and which was unprotected by any screen or tent. Dipping the lamp into the solder would have been a proper and usual mode of obtaining the flare provided the lamp had been in good order. The safety-valve of the lamp not being in working order, as the plumber ought to have known, the lamp exploded, with the result that the plaintiff who was passing on the highway was splashed by the molten solder and thereby injured. In an action by him against the defendants in the City of London Court for damages in respect of the injuries so occasioned to him, the deputy judge held that the plumber was not doing the work as an independent contractor, but under the defendants' supervision and control, and that the defendants were responsible for his negligence as above mentioned;—

Held (reversing the judgment of a Divisional Court, [1899] 1 Q. B. 221), that the judgment of the deputy judge was right on the grounds, first, that there was evidence that the defendants and the plumber were jointly engaged in the performance of the work under such circumstances as to render the defendants liable for the negligence of which the plumber had been guilty; and, secondly, that, even if the plumber were an independent contractor, the defendants, having authorized the performance upon a highway of work which from its nature was likely to involve danger to persons using the highway, were bound to take care that those who executed the work for them did not negligently cause injury to such persons. HOLLIDAY *v.* NATIONAL TELEPHONE COMPANY - - - - C. A. 392

NEGLIGENCE—*continued.*

2. —— *Public Body — Contract to Execute Works — Negligence of Contractor — Liability of Employer — Practice — Separate Defence of two Defendants—Payment into Court by one Defendant —Verdict for less than Amount paid in—Liability of the other Defendant for Costs.*

A district council, acting under the Public Health Act, 1875, s. 150, employed a contractor to make up a highway, which was used by the public, but had not become repairable by the inhabitants at large. In carrying out the work the contractor negligently left on the road a heap of soil, unlighted and unprotected. A person walking along the road after dark fell over the heap and was injured. In an action against the district council and the contractor to recover damages for the injuries sustained:—

Held, that as, from the nature of the work, danger was likely to arise to the public using the road, unless precautions were taken, the negligence of the contractor was not casual, or collateral to his employment, and the district council were liable.

Where two defendants are sued, and put in separate defences, and one of them has paid money into court exceeding the amount ultimately recovered in the action, the other defendant cannot avail himself of the payment into court by his co-defendant as a satisfaction of the cause of action against himself, and, on the failure of his defence, the plaintiff is entitled to have judgment entered against him for costs.

Judgment of Bruce J., reported [1898] 2 Q. B. 212, affirmed. PENNY *v.* WIMBLEDON URBAN DISTRICT COUNCIL - - - C. A. 72

—— Defect in plant or machinery—Knowledge of workman—Risk voluntarily incurred
See EMPLOYER AND WORKMAN. 4. 338

NOTICE—Forfeiture—Reasonable notice before action for - - - - - 79
See LANDLORD AND TENANT. 2.

—— Licence—Application for—Justices proceeding on insufficient notice—Mandamus to hear and determine - - 455
See LICENSING ACTS. 2.

—— Of objection—Power of amendment—Occupiers' list - - - - - 273
See PARLIAMENT.

NUISANCE—Pollution of river—Lawful exercise of right to impound or divert water 385
See RIVER.

—— Sewerage—Drainage of houses—Want of structural convenience — Liability of owners - - - - 41
See LOCAL GOVERNMENT. 3.

OBJECTION—Notice of—Power of amendment—Mistake—Occupiers' list - - 273
See PARLIAMENT.

OFFENCES—Licensing Acts 154, 308, 449, 607
See LICENSING ACTS. 4—7.

—— Unwholesome meat—Damage by reason of seizure—Findings of arbitrator—Costs of summons - - - - 286
See LOCAL GOVERNMENT. 2.

OFFICIAL RECEIVER—Payment of assets to, without retaining debt — Executor — Mistake - - - - 347
See BANKRUPTCY. 5.

ORDER AND DISPOSITION—Reputed ownership —Stands used to shew off goods in shop
See BANKRUPTCY. 6. 679

PARLIAMENT — *Franchise — Occupiers' List — Notice of Objection—Power of Amendment—Mistake—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict.* c. 26), *s.* 28, *sub-s.* 2.

The mistakes in notices of objection which a revising barrister is empowered to correct under s. 28 of 41 & 42 Vict. c. 26, include mistakes of law.

In a notice of objection to the retention of a person's name on the occupiers' list of voters in a borough the objector described himself as "on the list of parliamentary electors and burgesses" for a certain parish in the borough, but incorrectly inserted as his place of abode his shop, which was his qualifying property, and at which, though he spent the greater part of the day there, he did not reside. His reason for so doing was that his shop was situate in the borough and his place of abode was at some distance from the borough, and he thought he ought to give his address within the borough. No one was misled by the misstatement:—

Held, that the misstatement of the place of abode was a mistake which the revising barrister had power to amend.

Decision of the Divisional Court, [1899] 1 Q. B. 102, affirmed. PRESCOTT *v.* LEE C. A. 273

PASSENGER — Duty — Exemption—Third-class passengers—Extra charge for reserved carriage - - - - 267
See RAILWAY. 2.

PATENT — Costs — Solicitor and client — Shorthand notes—Patent action - 488
See PRACTICE. 2.

PAYMENT INTO COURT—By one defendant—Verdict for less than amount paid in—Liability of other defendant for costs 72
See NEGLIGENCE. 2.

PEACE—Preservation of—Expenses of maintaining troops—Liability—Mandamus 536
See COUNTY COUNCIL.

PIANO — Innkeeper providing — Music—Public Health Acts - - - 121
See LICENSING ACTS. 3.

POLICY—Deviation—Income tax—Participating policy-holders—Return of premium by way of bonus—Annual profits or gains
See REVENUE. 6. 439

POLICY—*continued.*

—— Marine insurance.
See Cases under INSURANCE, MARINE.

POLLUTION OF RIVER — Nuisance — Lawful exercise of right to impound or divert water - - - - 385
See RIVER.

POOR-RATE — *Waterworks — Rateable Value — Works not directly earning Profit in Parish—Capital Value, Interest on—Cost of Construction.*

The corporation of Liverpool were empowered by Act of Parliament to construct a reservoir and other works in a parish in Wales for the purposes of the supply of water to Liverpool. The construction of the reservoir and works involved the submersion of the sites of the parish church, vicarage, and schools, and likewise the stopping up and diversion of certain roads. The Act required the corporation to provide sites for and erect a new church, vicarage, and schools in substitution for those which would be submerged, and to make certain new roads and bridges which were necessary for the purposes of the before-mentioned diversion. The corporation carried out the works in conformity with the Act, provided the requisite new church, vicarage, and schools, and made the necessary new roads and bridges. The corporation, having been rated to a poor-rate in respect of the reservoir and works, appealed to the quarter sessions against the rate. The sessions decided that, in estimating the capital value of the reservoir and works for the purpose of arriving at the rateable value, the amounts expended by the corporation in providing the new church, vicarage, and schools, and making the new roads and bridges, ought to be included as being part of the capital cost of the works:—

Held (reversing the judgment of a Divisional Court), that there was nothing wrong in point of law in the decision of the sessions, which must therefore be affirmed. LIVERPOOL CORPORATION *v.* LLANFYLLIN ASSESSMENT COMMITTEE C. A. 14

PRACTICE — *Attachment of Debt — Garnishee Order, Action upon — Judgment — Company—Winding-up—Creditor—Rules of Supreme Court*, 1883, *Order XLII., r.* 24; *Order XLV.*

An action for debt will lie on a garnishee order, but should not be resorted to if the amount can be recovered by execution under Order XLV., r. 3.

A garnishee order absolute had been obtained, under Order XLV., r. 3, against a limited company having property abroad, but none in this country on which execution could be levied:—

Held, by the Court of Appeal, that under Order XLII., r. 24, the garnishor could maintain an action on the garnishee order for the debt thereby ordered to be paid to him by the company, the garnishees, with a view to his presenting a petition, as a judgment creditor for winding up the company.

Decision of Phillimore J. affirmed.

In re Combined Weighing and Advertising Machine Co., (1889) 43 Ch. D. 99, considered. PRITCHETT *v.* ENGLISH AND COLONIAL SYNDICATE C. A. 428

PRACTICE—*continued.*

2. —— *Costs — Solicitor and Client — Shorthand Notes—Patent Action.*

Where on the trial of a patent action it was agreed in open court between counsel for the parties with the sanction of the judge that a shorthand writer's note of the evidence to be taken on behalf of the parties jointly should be used as the record of the evidence for the purposes of the trial:—

Held, that the solicitor of a party to the action was entitled to charge his client with money disbursed as his share of the cost of taking the shorthand note.

In re Blyth and Fanshawe, (1882) 10 Q. B. D. 207, distinguished. OSMOND *v.* MUTUAL CYCLE AND MANUFACTURING SUPPLY COMPANY C. A. 488

3. —— *Discovery—Affidavit of Documents—Production—Matter tending to impeach Case of Party claiming Privilege — Information by Attorney-General—Claim of Crown to Foreshore.*

On an information by the Attorney-General claiming on behalf of the Crown a declaration of title to foreshore, it was ordered by a Divisional Court that the defendant should make a further affidavit of discovery and should produce for inspection by the informant all documents therein specified except such as the defendant should by his affidavit identify and state to relate solely to the case of the defendant and to contain nothing impeaching the case of the defendant or supporting the case of the informant:—

Held, by the Court of Appeal, on the authority of *Morris* v. *Edwards*, (1890) 15 App. Cas. 309, that the order must be varied by striking out the words "impeaching the case of the defendant or," as the defendant's affidavit would be sufficient to support an objection to produce documents without those words. ATTORNEY-GENERAL *v.* NEWCASTLE-UPON-TYNE CORPORATION C. A. 478

4. —— *Interrogatories—Action for Slander—Rules of Supreme Court, Order XXXI., rr.* 1, 6.

In an action for slander the plaintiff administered the following interrogatories to the defendant:—

"Did you on or about the 1st of March, or when, speak the following words of the plaintiff" (setting out the words alleged in the statement of claim to have been spoken by the defendant of the plaintiff), "or words to that effect?

"Were the said words spoken in the presence of" (two persons named in the statement of claim), "and other persons, or any and which of them?"

Held, that these were proper interrogatories, and that the defendant must answer them.

Decision of Lawrance J. reversed. DALGLEISH *v.* LOWTHER - - - - C. A. 590

5. —— *Set-off of Judgments—Solicitor's Lien — Charging Order—Costs—Solicitors Act*, 1860 (23 & 34 *Vict. c.* 127), *s.* 28—*Rules of Supreme Court, Order LXV., r.* 14.

An order may be made allowing a judgment debtor to set off against the damages due from him damages due to him from the judgment creditor on a judgment in another action, notwithstanding the existence of an order under the Solicitors Act, 1860, s. 28, charging the first-mentioned damages with a solicitor's costs:

So *held* by A. L. Smith L.J. and Vaughan Williams L.J., the latter doubting. GOODFELLOW *v.* GRAY - - - - C. A. 498

6. —— *Striking out Statement of Claim — Claim to set aside Judgment by Default on ground of Fraud—Claim for maliciously representing a Bankruptcy Petition without alleging Special Damage—Order XXV., r.* 4; *Order XXVII., r.* 15.

An action will lie to set aside a judgment by default on the ground of fraud; but if recourse is had to an action instead of the shorter method of procedure by affidavit of merits under Order XXVII., r. 15, quære whether the Court may not in a proper case order payment into court of the sum due on the judgment as a condition of allowing the action to proceed.

Whether or not an action will lie without an allegation of special damage for falsely and maliciously and without reasonable or probable cause presenting a bankruptcy petition, the question is not one which will be determined upon an application to strike out the statement of claim as disclosing no reasonable cause of action. WYATT *v.* PALMER - - - C. A. 106

7. —— *Transfer of Action — Action under Fatal Accidents Act*, 1846 (9 & 10 *Vict. c.* 93)—*Decree for Limitation of Liability in the Admiralty Division—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 503—*Rules of Supreme Court, Order XLIX., r.* 3.

Where an action under the Fatal Accidents Act, 1846, was brought in the Queen's Bench Division by a widow against shipowners for the loss of her husband through the negligent management of their ship by the defendants' servants, and the defendants had obtained a decree in the Admiralty Division for limitation of their liability in accordance with the Merchant Shipping Act, 1894, s. 503:—

Held, that the action in the Queen's Bench Division ought not to be transferred to the Admiralty Division. ROCHE *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY C. A. 502

—— Payment into court by one defendant—Verdict for less than amount paid in—Liability of other defendant for costs
See NEGLIGENCE. 2. 72

PRINCIPAL AND AGENT—*Contract by Agent in Name of Principal, but for his own Benefit—Ratification by Principal.*

Where an agent makes a contract purporting to sell goods in the name of a principal, but with the fraudulent intention of selling them on his own account and for his own benefit, it is competent for the principal to ratify and take the benefit of the contract as against the buyers. *In re* TIEDEMANN AND LEDERMANN FRÈRES Div. Ct. 66

—— Signature by agent "thereunto lawfully authorized"—Memorandum in writing—Statute of Frauds - - 414
See CONTRACT. 2.

PRIVILEGE—Matter tending to impeach case of party claiming—Discovery - 478
See PRACTICE. 3.

PRODUCTION OF DOCUMENTS — Discovery — Matter tending to impeach case of party claiming privilege - - - - 478
See PRACTICE. 3.

PROOF—Assessed taxes—Power of Court to go behind assessment—Scheme of arrangement - - - - - - 145
See BANKRUPTCY. 9.

—— Contract to take shares—Proof for injury caused by disclaimer by trustee in bankruptcy—Measure of damages 579
See BANKRUPTCY. 7.

—— Damages in the Divorce Court—Bankruptcy of co-respondent—Judgment summons
See BANKRUPTCY. 8. 62

PUBLIC AUTHORITIES — *Costs — Taxation — Action against Public Authority — "Judgment obtained" by Defendants—Consent Order dismissing Action with Costs—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*b*).

In an action against a county council for acts done by them in pursuance of the Local Government Act, 1894, an order was made in chambers by consent that the action be dismissed, and that the plaintiff do pay to the defendants their taxed costs of the action:—

Held, that the defendants had obtained judgment within the meaning of s. 1 (*b*) of the Public Authorities Protection Act, 1893, and that the costs must therefore be taxed as between solicitor and client. SHAW *v.* HERTFORDSHIRE COUNTY COUNCIL - - - - **C. A. 282**

PUBLIC BODY—Contract to execute works—Negligence of contractor—Liability of employer - - - - 72
See NEGLIGENCE. 2.

PUBLIC HEALTH—Infectious disorder—Order for removal - - - **191, 301**
See JUSTICES. 1, 2.

—— Music—Innkeeper providing piano - 121
See LICENSING ACTS. 3.

—— Nuisance by sewerage—Drainage of houses — Want of structural convenience — Liability of owners - - 41
See LOCAL GOVERNMENT. 3.

—— Unwholesome meat—Damage by reason of seizure—Findings of arbitrator—Costs of summons - - - - 286
See LOCAL GOVERNMENT. 2.

—— Water tower—Effect of Public Health Acts on subsequent special water company's Act - - - - - - 664
See LOCAL GOVERNMENT. 1.

PUBLIC-HOUSE — Bar of — Place "used" for betting - - - - 380
See GAMING. 2.

—— Licensing Acts.
See LICENSING ACTS.

—— Part of building used for dwelling-house approaches - - - - 193
See LONDON. 1.

RAILWAY — *Liability to Fence — Owner and Occupier of adjoining Land—Adjoining Highway*

RAILWAY—*continued.*

—Licensee of Owner of Soil—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 68.

A railway company, whose premises adjoin a public highway, is not bound to fence against cattle straying upon the highway, and not merely passing and repassing along it, although they are upon the highway by permission of the owner of the soil.

Cattle belonging to a farmer were allowed to graze in a wood adjoining his farm; through the wood ran a highway, the property in the soil of which was in the owner of the wood. The cattle got upon the highway, and left it at a point where it was adjacent to the land of a railway company, and, getting on to the line along an unfenced approach road belonging to the railway company, were killed by a passing train:—

Held, that the railway company were not liable. LUSCOMBE *v.* GREAT WESTERN RAILWAY COMPANY - - - - - **Div. Ct. 313**

2. —— *Passenger Duty—Exemption—Third-class Passengers—Extra Charge for Reserved Carriage — Railway Passenger Duty Act*, 1842 (5 & 6 *Vict. c.* 79), *s.* 2, *Schedule—Cheap Trains Act*, 1883 (46 & 47 *Vict. c.* 34), *s.* 2, *sub-s.* 1.

By 5 & 6 Vict. c. 79, s. 2, and the schedule to that Act, a duty at the rate of 5 per cent. is made payable upon all sums received or charged for the hire, fare, or conveyance of passengers conveyed for hire upon any railway. By 46 & 47 Vict. c. 34, s. 2, sub-s. 1, fares not exceeding the rate of one penny a mile are exempt from duty.

A railway company, whose third-class fares did not exceed a penny a mile, abolished all its second-class carriages and fares, and in lieu of them introduced a system by which third-class passengers, after taking and paying for their tickets, could for an extra charge procure "supplementary reserve tickets," entitling them to travel in reserved third-class compartments not available for the ordinary third-class passengers who had not paid the extra charge:—

Held, that the extra sums were paid in respect of extra accommodation incidental to the conveyance of the passengers, and that the Crown was entitled to duty upon the sums received by the railway company in all cases where the sum paid for the supplementary ticket when added to that paid for the ordinary third-class ticket exceeded a penny a mile. ATTORNEY-GENERAL *v.* FURNESS RAILWAY COMPANY - **Div. Ct. 267**

3. —— *Rates—Exemptions—Land used as Railway for Public Conveyance—Liverpool Corporation Act*, 1893 (56 & 57 *Vict. c. clxxxi.*) (*Local*), *s.* 36 (*ii.*).

The Liverpool Corporation Act, 1893, s. 36, provides that no person occupying "land used as a railway made under the powers of any Act of Parliament for public conveyance" shall be rated in respect of the same to the general rate leviable by the corporation in any greater proportion than one-fourth part of the net annual value. A railway company occupied land in Liverpool for a goods station. The premises consisted of a large covered shed, open on one side; and, on the other, with openings in the walls to admit trucks. Inside the shed were a number of railway lines,

RAILWAY—*continued.*
comprising sidings, and running alongside platforms, for the purpose of loading and unloading railway trucks with goods. All these lines were used for the conveyance of any goods sent by the public to or from the premises. The premises were some distance from the company's main line, and were connected therewith by a dock line belonging to the Mersey Docks and Harbour Board, who under statutory powers permitted the company to use such line, and by a tramway laid across a street by the company under a licence granted by the corporation under statutory powers. The company's premises were acquired and laid out under powers conferred upon them by a private Act:—

Held, that the land used for the lines, sidings, and platforms inside the company's premises was "land used as a railway made under the powers of an Act of Parliament for public conveyance" within the meaning of s. 36 of the Liverpool Corporation Act, 1893, and that the company were, therefore, entitled to the partial exemption in respect of rating contained in that section. WILLIAMS *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - - Div. Ct. 197

—— Stamp—Receipt for compensation for not working coal adjacent to railway—Right of support - - - - 652
See REVENUE. 9.

—— Traveller—Falsely pretending to be a—Offences - - - - 308
See LICENSING ACTS. 4.

—— Wooden structure used in connection with traffic—Licence of county council—Exemption - - - - 277
See LONDON. 2.

RATES—Exemption—Land used as railway for public conveyance—Liverpool Corporation - - - - - 197
See RAILWAY. 3.

—— Waterworks—Costs of construction—Works not directly earning profits in parish 14
See POOR-RATE.

RATIFICATION—By principal—Contract by agent in name of principal, but for his own benefit - - - - 66
See PRINCIPAL AND AGENT.

RECEIPT—Money received by servant on account of master and handed over to fellow-servant—Acknowledgment of receipt by fellow-servant - - - - 158
See REVENUE. 8.

—— Stamp—Compensation for not working coal adjacent to railway - - 652
See REVENUE. 9.

RECEIVER—Executor—Payment of assets to official receiver without retaining debt—Mistake - - - - 347
See BANKRUPTCY. 5.

RECEIVING ORDER—Trustee in bankruptcy—Vacating office—Rescission of receiving order—Restoration - - - 587
See BANKRUPTCY. 10.

RELEASE—Stamp—Receipt for compensation for not working coal adjacent to railway - - - - - 652
See REVENUE. 9.

—— Trustee in bankruptcy—Error in administration—Revocation by Board of Trade
See BANKRUPTCY. 12. 97

REMOTENESS—Depreciation of cargo—General average - - - - - 403
See SHIPPING. 3.

REMOVAL—Order for—Infectious disorder—Public health - - - 191, 301
See JUSTICES. 1, 2.

RENT—Arrears—Lien—Priority—Payment by sheriff—Indemnity - - - 566
See BANKRUPTCY. 3.

REPUDIATION—Concealment of identity of lender—Fraud—Right of borrower to repudiate - - - - 641
See CONTRACT. 1.

REPUGNANCY—By-law—Betting in streets—Statutory enactment - - - 34
See GAMING. 1.

REPUTED OWNERSHIP—Order and disposition—Stands used to shew off goods in shop
See BANKRUPTCY. 6. 679

RESCISSION—Receiving order—Trustee in bankruptcy—Vacating office—Restoration - - - - - 587
See BANKRUPTCY. 10.

RESTITUTION OF PROPERTY—Current coin of the realm—Larceny - - 111
See CRIMINAL LAW.

RETAINER—Executor—Payment of assets to official receiver without retaining debt—Mistake - - - - 347
See BANKRUPTCY. 5.

REVENUE—*Estate Duty—Annuity—Bequest of—Direction to raise Portions for Grandchildren—Limitations to Persons by Way of Succession—Settlement Estate Duty—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub s.* 1; *s.* 22, *sub-s.* 1.

A testatrix by her will bequeathed an annuity to A., and directed that a portion of her estate should be set apart to provide for the payment of the annuity, and subject thereto she bequeathed the said portion of her estate to B.:—

Held, that the property so set apart to provide for the payment of the annuity was property "standing limited to or in trust for persons by way of succession" within the meaning of s. 2, sub-s. 1, of the Settled Land Act, 1882, and that settlement estate duty was consequently payable in respect of it.

A testator bequeathed his residuary estate to trustees on trust to pay the income to his wife for life, and after her death to pay an annuity to each of his four daughters for life, and after the death of each of his daughters to raise certain named sums in trust for the children of such daughter who should attain the age of twenty-one years, or being females, should marry under that age:—

Held, that the direction to raise the portions

REVENUE—*continued.*

amounted to a limitation in favour of the testator's grandchildren to take effect upon the death of his daughters, that there was therefore a succession in respect of such portions, and that settlement estate duty was payable upon them. ATTORNEY-GENERAL *v.* OWEN. ATTORNEY-GENERAL *v.* COULSON - - - - **Div. Ct. 253**

2. —— *Estate Duty — Annuity — Change of Security—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*b*); *s.* 3, *sub-s.* 1.

The defendant was the owner of freehold estates in the county of L., and he was also the tenant for life of freehold estates in the county of D. The L. estates were charged with the payment of an annual jointure rent-charge. The person entitled to this rent-charge, by agreement with the defendant in 1883, released the L. estates, and the defendant in consideration granted to her an annuity charged on his life interest in the D. estates, and secured by policies of assurance on his life. On the death of the annuitant the Crown claimed estate duty from the defendant under s. 2 of the Finance Act, 1894:—

Held, that the Crown was entitled to the duty, since the transaction in 1883 was not the grant of an annuity for full consideration in money or money's worth paid to the grantor for his own use or benefit within the meaning of s. 3 of the Finance Act, 1894, but merely a transfer of the security for the jointure rent-charge from the L. estates to the D. estates. ATTORNEY-GENERAL *v.* SMITH-MARRIOTT - - - **Div. Ct. 595**

3. —— *Estate Duty—Reversionary Interest—Settlement of—Competency to dispose of Property during continuance of Settlement—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*b*); *s.* 5, *sub-s.* 2.

The owner of an absolute reversionary interest in settled personal property, who during the lifetime of the tenant for life makes a settlement of his reversionary interest, reserving a life interest to himself, is a person who was "during the continuance of the settlement competent to dispose of" the property within the meaning of s. 5, sub-s. 2, of the Finance Act, 1894, and therefore upon his death estate duty is payable upon the value of his interest, notwithstanding that estate duty has previously been paid upon it at the death of the original tenant for life. ATTORNEY-GENERAL *v.* HAY - - - **Div. Ct. 245**

4. —— *Estate Duty—Surrender of Life Interest to Remainderman—Death of Life Tenant within Twelve Months—Settled Property—Property passing on Death—Interest ceasing on Death—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*); *s.* 7, *sub-s.* 7.

Where the tenant for life of settled property has released the life interest in favour of the remainderman and dies within twelve months of such release, estate duty is payable by the remainderman on the principal value of the property under s. 2, sub-s. 1 (*c*), and s. 7, sub-s. 7, of the Finance Act, 1894. ATTORNEY-GENERAL *v.* DE PRÉVILLE - - - - **Div. Ct. 238**

5. —— *Income Tax — Deduction of Income Tax from Interest or Annuities—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *Scheds. A and D—Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-s.* 3.

A county council had deducted income tax under s. 24, sub-ss. 3, of the Customs and Inland Revenue Act, 1888, from the interest paid by them on their consolidated stock. The fund from which such interest was paid consisted partly of interest which had been received by them on loans made by them to other local authorities, and from which, in accordance with the section, income tax under Sched. D had been deducted before payment, and partly of the rents and profits of land on which income tax under Sched. A had been paid:—

Held, that the county council were entitled to retain a proportion of the income tax which they had deducted corresponding to the proportion in which the interest on the consolidated stock had been paid out of moneys on which income tax under Sched. D had been already paid; but that they were not entitled to retain the proportion of the deducted income tax which corresponded to the proportion in which the interest on the consolidated stock had been paid out of moneys charged with income tax under Sched. A. ATTORNEY-GENERAL *v.* LONDON COUNTY COUNCIL **Div. Ct. 226**

6. —— *Income Tax—Life Insurance Company—Participating Policy-holders—Return of Premium by way of Bonus—Annual Profits or Gains—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *Sched. D.*

A life insurance company had a capital divided into shares, the dividends on which were limited by the articles of association to 7 per cent. The powers of the company were vested in a board of directors elected by the shareholders; the board appointed the officers of the company, and by the officers determined the rates of premium and the terms of insurance, and generally managed the affairs of the company. The company issued participating policies, and by the articles the insurance business was to be conducted on the mutual plan. The earnings and receipts over and above the dividends, losses, and expenses were accumulated from year to year, and every five years a balance was struck and the net surplus in the hands of the company, after deducting an amount sufficient to cover all outstanding risks and obligations, was, in compliance with the articles of association, divided among the holders of participating policies, each policy-holder being credited with an equitable share of such surplus:—

Held, that the surplus returned or credited to the policy-holders was "annual profits or gains," and was assessable to income tax.

Last v. *London Assurance Corporation*, (1885) 10 App. Cas. 438, and *New York Life Insurance Co.* v. *Styles*, (1889) 14 App. Cas. 381, considered. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES *v.* BISHOP - - **Div. Ct. 439**

7. —— *Stamp—Conveyance on Sale—Declaration of Trust—Agreement for Sale of Equitable Interest—Company — Shares — Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 59.

The shareholders of the A. company, which was then in course of being voluntarily wound up, entered into an agreement in writing with

REVENUE—*continued.*

the B. company whereby it was agreed that the shareholders of the A. company should respectively exchange their shares in the A. company for shares in the B. company, and that upon the B. company allotting to them the shares to which they were respectively entitled they should thenceforth hold their respective shares in the A. company in trust for the B. company :—

Held, by Wills and Bruce JJ., that the agreement amounted to a declaration of trust, and as such to a "conveyance on sale" to the B. company of an equitable interest in the shares of the A. company within the meaning of s. 54 of the Stamp Act, 1891, and was chargeable with an ad valorem duty accordingly :

Held, also, by Wills J., that it was an agreement for the sale of an equitable interest in property within the meaning of s. 59. CHESTERFIELD BREWERY COMPANY *v.* INLAND REVENUE COMMISSIONERS - - - - - Div. Ct. 7

8. —— *Stamp—"Receipt"—Money received by Servant on account of Master and handed over to Fellow Servant—Acknowledgment of Receipt by Fellow Servant—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 101.

A solicitor was employed by a bank under an agreement whereby he was appointed an officer of the bank upon the terms that he was to be paid a salary, and to be provided with an office, stationery, and staff of clerks, and was to devote his whole time to the conduct of the legal business of the bank. The solicitor from time to time sued for and recovered sums of money due to the bank. As each sum was recovered he entered the amount in an account book, and then in accordance with his duty handed over the money to the secretary or cashier of the bank, who wrote against the entry in the account book his initials and the date on which the money was handed over to him, in some instances adding the word "received." The account book was the property of the solicitor and remained in his possession :—

Held, that as the initialling of the entries in the account book, whether with the addition of the word "received" or not, was intended as an acquittance of the solicitor in respect of the money handed over by him, the entries so initialled constituted "receipts" within s. 101 of the Stamp Act, 1891, and required to be stamped, none the less because the solicitor was a servant of the bank on whose behalf he had received the money, and the acknowledgment of the receipt of the money from him was given by a fellow-servant. ATTORNEY-GENERAL *v.* CARTON BANK Lord Russell of Killowen C.J. 158

9. —— *Stamp—"Release or Renunciation of Property upon a Sale"—Receipt for Compensation for not Working Coal adjacent to Railway—Right of Support—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 78.

A railway company having given notice under s. 78 of the Railways Clauses Consolidation Act, 1845, to a colliery company not to work certain coal under and adjacent to their railway, compensation therefor was assessed. The colliery company gave the railway company a receipt

REVENUE—*continued.*

under seal for the amount of the compensation, in which they undertook to leave the coal in question unworked, and further undertook to do and execute all deeds, matters, or things necessary for vesting the same in the railway company whenever required, and the document continued : "We further acknowledge and declare that the said sum includes satisfaction and compensation for all claims which but for these presents we might have maintained, either under the provisions of any statute, or at law or in equity, against the railway company in respect of the said coal" :—

Held, that the document was not a release or renunciation of property, or of any right or interest in property, upon a sale, and was, therefore, not chargeable with ad valorem duty, but that it was a release of an interest in property, and should, therefore, bear a 10*s.* stamp. GREAT NORTHERN RAILWAY COMPANY *v.* INLAND REVENUE COMMISSIONERS - - - - Div. Ct. 652

REVERSIONARY INTEREST — Settlement — Estate duty - - - - 245
See REVENUE. 3.

REVOCATION—By Board of Trade—Release of trustee—Error in administration - 97
See BANKRUPTCY. 12.

RIVER—*Nuisance—Pollution of River—"Putrid Solid Matter"—Lawful Exercise of Right to Impound or Divert Water—Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 2, 17, 20.

Sect. 2 of the Rivers Pollution Prevention Act, 1876, prohibits the putting, or causing or knowingly permitting to be put, or to fall into any stream, so as to pollute its waters, "any putrid solid matter," and by s. 20 of the Act "solid matter" shall not include particles of matter in suspension in water. By s. 17 the Act "shall not apply to or affect the lawful exercise of any rights of impounding or diverting water."

The defendant owned weaving sheds, worked by steam-power, on the bank of a river, and he had, for the purposes of his business, for many years prior to the passing of the Act lawfully exercised the right of diverting water from the river by means of a goit and dealing with the same in the following manner. The water so diverted being full of substances discharged into the stream from paper manufactories, not belonging to the defendant, higher up the stream it had, before it could be used by the defendant for the purposes of his business, to be impounded in a reservoir and allowed to settle. Whilst it was so impounded, the substances contained therein sank to the bottom, and, after about three days, became putrescent in the form of sludge. The water at the top when thus cleared was taken from the reservoir and used for condensing and boiler purposes. Once a week the reservoir was cleaned by opening the sluice-gates into the river, and allowing the water to flow through the reservoir and out into the stream, carrying with it the sludge deposited in the reservoir. The effluent water as it went into the stream through the sluice-gates contained 97·6 per cent. of water and 2·4 per cent. of solid matter :—

Held, by A. L. Smith L.J. and Rigby L.J. (affirming the decision of Lord Russell of Kil-

RIVER—*continued.*
lowen C J. and Wills J., [1899] 1 Q. B. 27), that the solid matter when it entered the stream from the reservoir was "in suspension in water" within the meaning of s. 20 and therefore not "solid matter" within s. 2 of the Act:

Held, also (by A. L. Smith L.J., Rigby L.J., and Vaughan Williams L.J.), that, assuming that what was put into the stream was "solid matter" within the meaning of s. 2, the defendant was protected by s. 17 and therefore not liable to be proceeded against under the Act. RIVER RIBBLE JOINT COMMITTEE *v.* HALLIWELL. THE SAME *v.* SHORROCK - - - - - C. A. 385

RULES OF SUPREME COURT:—
—— **Order XXV., r. 4**—*Proceedings in lieu of Demurrer* - - - - 106
See PRACTICE. 6.

—— **Order XXVII., r. 15**—*Default of Pleading* 106
See PRACTICE. 6.

—— **Order XXXI., rr. 1, 6**—*Discovery and Inspection* - - - - 590
See PRACTICE. 4.

—— **Order XLII., r. 24**—*Execution* - 428
See PRACTICE. 1.

—— **Order XLV.**—*Attachment of Debts* - 428
See PRACTICE. 1.

—— **Order XLIX., r. 3**—*Transfers and Consolidation* - - - - - 502
See PRACTICE. 7.

—— **Order LXV., r. 14**—*Costs* - - 498
See PRACTICE. 5.

SALVAGE—Charterparty—Construction—Division of sum awarded for salvage services
See SHIPPING. 1. 690

SCHEME OF ARRANGEMENT—Proof for assessed taxes—Power of Court to go behind assessment - - - 145
See BANKRUPTCY. 9.

SEAMAN—Termination of service abroad—"Passage home" - - - - 217
See SHIPPING. 5.

SECURED CREDITOR—Contract induced by fraud of bankrupt—Election by vendor to affirm contract—Right of trustee to redeem security at value assessed in petition - - - - - 549
See BANKRUPTCY. 4.

SECURITY—Debt—Power to assignee to sue in name of assignor—Absolute assignment
See ASSIGNMENT. 613

SERVANT.
See Cases under EMPLOYER AND WORKMAN.

—— Money received by, on account of master and handed over to fellow-servant—Acknowledgment of receipt by fellow-servant - - - - - 158
See REVENUE. 8.

—— Seaman—Termination of service abroad—"Passage home" - - - 217
See SHIPPING. 5.

SET-OFF—Judgments—Costs—Solicitor's lien—Charging order - - - - 498
See PRACTICE. 5.

SETTING ASIDE—Judgment by default on ground of fraud—Claim to set aside 106
See PRACTICE. 6.

SETTLED LAND—Estate duty.
See REVENUE.

SETTLEMENT—Estate duty.
See REVENUE.

—— Voluntary—Gifts of jewels and money 57
See BANKRUPTCY. 14.

SEWERS—Nuisance—Drainage of houses—Want of structural convenience—Liability of owners - - - - - 41
See LOCAL GOVERNMENT. 3.

—— Volunteer corps—Storehouse and drill-hall—Sewerage and drainage - - 447
See VOLUNTEERS.

SHARES—Contract to take shares—Proof for injury caused by disclaimer by trustee in bankruptcy—Measure of damages
See BANKRUPTCY. 7. 579

SHERIFF—Levy by—Tools of trade—Execution creditor—Small Debts Act - 54
See BANKRUPTCY. 2.

—— Sale by—Rent in arrear—Lien—Priority—Payment by sheriff—Indemnity - 566
See BANKRUPTCY. 3.

SHIPPING — *Charterparty — Division of Sum Awarded for Salvage Services—Construction of Charterparty.*

A charterparty provided (clause 2) that the shipowner should maintain the chartered vessel (the steamship *Pocklington*) in a thoroughly efficient state for and during the service. Clause 6 provided that if any damage prevented the working of the vessel for more than twenty-four hours the hire should cease. By clause 13 the vessel had liberty to tow and assist vessels in distress, and to deviate for the purpose of saving life or property. By clause 20 all derelicts and salvage were to be "for owners' and charterers' equal benefit." The shipowners obtained an award in the Admiralty Court for a large sum for salvage services rendered by the *Pocklington* in towing another vessel in distress. Through performing those services the hull, engines, and towing gear of the *Pocklington* were strained and damaged, and she incurred expenses and losses attributable to the salvage services in respect of repairs, the costs of gear used in towage, loss of hire for several days whilst she was under repair, and other matters. In an action by the charterers against the shipowners to recover a moiety of the salvage earned by the *Pocklington*:—

Held, that the defendants were entitled to deduct from the amount awarded by the Admiralty Court all such losses and expenses incurred by them (including loss of hire) as were attributable to the salvage services, and that the balance only ought to be divided between themselves and the plaintiffs. BOOKER & Co. *v.* POCKLINGTON STEAMSHIP COMPANY
Bigham J. 690

SHIPPING—*continued.*

2. —— *Charterparty—Full and Complete Cargo—Cargo in Frozen Condition—Decrease of Amount that could be Stowed.*

In an action against charterers for not loading a full and complete cargo of wet woodpulp, it appeared from the charterparty that the contemplated loading was to be in midwinter, at which time, as the evidence shewed, wet woodpulp arrived at the port of loading, and was loaded, in a frozen condition. In this condition it would not stow so closely as when unfrozen, and consequently a lesser amount could be loaded than if the pulp had been in a normal condition:—

Held, by A. L. Smith and Rigby L.JJ., that the charterers in loading as much wet woodpulp in a frozen condition as the ship would carry had performed their obligation to load a full and complete cargo:

Held, by Vaughan Williams L.J., that, to relieve the charterers from liability, it was not enough to shew that wet woodpulp was habitually loaded in winter in a frozen condition, but it must also be shewn that cargoes so loaded were accepted as full and complete cargoes, and that as there was no evidence of such a custom the defendants were liable. STEAMSHIP ISIS COMPANY *v.* BAHR, BEHREND & ROSS - - **C. A. 364**

3. —— *General Average — Depreciation of Cargo—Remoteness.*

The plaintiffs shipped a deck cargo of cattle and sheep on board the defendants' ship for carriage from Buenos Ayres to Deptford under a contract which provided that the ship should on no account call at a Brazilian port before landing her live stock. The reason for this provision was that by an Order of the Board of Agriculture foreign animals could not be landed in the United Kingdom if the ship conveying them had touched at a Brazilian port in the course of her voyage. During the voyage the ship sprung a leak, and the master, for the safety of all concerned, put into a Brazilian port for repairs. The plaintiffs thereby suffered loss in consequence of the live stock being unable to be landed in the United Kingdom, and having to be sold elsewhere at lower prices than would have been realized in the English market. The master at the time when he resolved to put into the Brazilian port knew that this would be the result of his so doing:—

Held, that the depreciation of the live stock was a loss which the plaintiffs were entitled to have made good in general average. ANGLO-ARGENTINE LIVE STOCK AND PRODUCE AGENCY *v.* TEMPERLEY SHIPPING COMPANY **Bigham J. 403**

4. —— *General Average—Sacrifice of Freight.*

Shippers chartered a ship to carry a cargo of coals from Cardiff to Esquimalt. In the course of the voyage the coal heated to such an extent that if the ship had continued her voyage the ship and cargo would have been totally lost. The master, for the safety of all concerned, put into a port of refuge and landed the coal, which was subsequently surveyed and found to be in such a condition as to be incapable of being carried with safety to its destination. The

SHIPPING—*continued.*

master accordingly abandoned the voyage, and the chartered freight was lost:—

Held, that the freight had not been sacrificed under such circumstances as to make the loss the subject of general average contribution. IREDALE *v.* CHINA TRADERS INSURANCE COMPANY **Bigham J. 356**

5. —— *Seaman — Termination of Service Abroad—"Passage Home"—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 186.

Where the service of a seaman belonging to a British ship terminates at a foreign port, and the master elects to "provide him with a passage home" under s. 186, sub-s. 2 (*c*), of the Merchant Shipping Act, 1894, the master is bound to provide him with a passage to the port in Her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by him.

Dicta in *Edwards* v. *Steel*, [1897] 2 Q. B. 327, followed. PURVES *v.* STRAITS OF DOVER STEAMSHIP COMPANY - - - - **C. A. 217**

—— Marine insurance.
See Cases under INSURANCE, MARINE.

—— Transfer of Action — Fatal accidents — Decree for limitation of liability in the Admiralty Division - - **502**
See PRACTICE. 7.

—— Unloading in dock—Workmen's Compensation Act - - - - **142**
See EMPLOYER AND WORKMAN. 7.

SHORTHAND NOTES — Costs — Solicitor and client—Patent action - - **488**
See PRACTICE. 2.

SIGNATURE — By agent "thereunto lawfully authorized"—Memorandum in writing—Statute of Frauds - - **414**
See CONTRACT. 2.

SLANDER—Interrogatories—Action for slander
See PRACTICE. 4. **590**

SMALL DEBTS ACT—Execution creditor—Levy by sheriff—Tools of trade - **54**
See BANKRUPTCY. 2.

SOLICITOR — *Charge for Costs — Property Recovered or Preserved—Property of Persons not Employing Solicitor—Probate Action—Practice—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

A testator by his will, after bequeathing his household furniture and effects to his wife, devised and bequeathed the residue of his real and personal estate to his wife for life, and, after her decease, to his two daughters, of whom one was his legitimate daughter by a former wife and the other was illegitimate, in equal shares. Probate of the will being opposed by the testator's daughters, the executor brought a probate action against them to establish its validity with the result that probate of the will was decreed. The bulk of the estate was realty:—

Held, that the solicitor who acted for the executor was entitled under the Solicitors Act, 1860, s. 28, to a charge for his costs in the action upon the property devised and bequeathed by the will as property preserved through his instrumentality. *Ex parte* TWEED - **C. A. 167**

SOLICITOR—*continued.*

2. —— *Costs of Inquiry before Incorporated Law Society—Jurisdiction—Judge at Chambers.*

Where a solicitor has been exonerated from charges brought against him on an inquiry before the Committee of the Incorporated Law Society, under s. 13 of the Solicitors Act, 1888, an application by him for the costs of the inquiry must be made to the Divisional Court, and not to a judge at chambers. *In re* DAVIDSON. *Ex parte* DAVIDSON - - - Div. Ct. 103

—— Costs—Shorthand notes—Patent action 488
See PRACTICE. 2.

—— Lien—Changing order—Costs—Set-off of judgments - - - - 498
See PRACTICE. 5.

SPORTING—Ground game—Whether owner occupying his own land can have rights of killing - - - - 436
See GAME.

STAMP—"Conveyance on sale"—Declaration of trust—Agreement for sale of equitable interest - - - - 7
See REVENUE. 7.

—— "Receipt"—Money received by servant on account of master and handed over to fellow-servant—Acknowledgment of receipt by fellow-servant - - 158
See REVENUE. 8.

—— Receipt for compensation for not working coal adjacent to railway—Right of support - - - - 652
See REVENUE. 9.

STATION—Railway—Offences—Falsely pretending to be a traveller - - 308
See LICENSING ACTS. 4.

STATUTES:—

29 Car. 2, c. 3, s. 4—*Frauds* - - 414
See CONTRACT. 2.

8 Anne, c. 14 (c. 18 in Rev. Stat.), s. 1—*Landlord and Tenant* - - - 566
See BANKRUPTCY. 3.

3 & 4 Will. 4, c. 42, s. 3—*Civil Procedure* 603
See COPYHOLD.

9 Geo. 4, c. 61, s. 14—*Alehouses* - - 455
See LICENSING ACTS. 2.

3 & 4 Vict. c. 61, s. 1—*Beerhouses* - 294
See LICENSING ACTS. 1.

5 & 6 Vict. c. 35, ss. 111, 113, 118—*Income Tax* - - - - - 145
See BANKRUPTCY. 9.

—— —— Scheds. A and D - - 226
See REVENUE. 5.

5 & 6 Vict. c. 79, s. 2, Sched.—*Railway Passenger Duty* - - - - 267
See RAILWAY. 2.

8 & 9 Vict. c. 20, s. 68—*Railways Clauses* 313
See RAILWAY. 1.

—— —— s. 78 - - - - 652
See REVENUE. 9.

8 & 9 Vict. c. 109, s. 18—*Gaming* - 560
See BANKRUPTCY. 13.

8 & 9 Vict. c. 127, s. 8—*Small Debts* - 54
See BANKRUPTCY. 2.

STATUTES—*continued.*

9 & 10 Vict. c. 93—*Fatal Accidents* - 502
See PRACTICE. 7.

10 & 11 Vict. c. 17, s. 93—*Waterworks Clauses*
See LOCAL GOVERNMENT. 1. 664

16 & 17 Vict. c. 34, Sched. D—*Income Tax* 439
See REVENUE. 6.

16 & 17 Vict. c. 119, s. 3—*Betting* - 380
See GAMING. 2.

20 & 21 Vict. c. 85, s. 33—*Matrimonial Causes*
See BANKRUPTCY. 8. 62

23 & 24 Vict. c. 127, s. 28—*Solicitors* - 498
See PRACTICE. 5.

—— —— - - - - - 167
See SOLICITOR. 1.

24 & 25 Vict. c. 96, s. 100—*Larceny* - 549
See BANKRUPTCY. 4.

—— —— - - - - - 111
See CRIMINAL LAW.

30 & 31 Vict. c. 134, s. 23—*Metropolitan Streets*
See GAMING. 1. 34

32 & 33 Vict. c. 27, s. 7—*Wine and Beerhouses*
See LICENSING ACTS. 2. 455

—— —— ss. 8, 19 - - - - 607
See LICENSING ACTS. 7.

32 & 33 Vict. c. 62, s. 5—*Debtors Act* - 62
See BANKRUPTCY. 8.

34 & 35 Vict. c. 98, s. 5—*Vaccination* - 632
See VACCINATION.

35 & 36 Vict. c. 94, s. 3—*Licensing* 154, 607
See LICENSING ACTS. 6, 7.

—— —— s. 25 - - - - 308
See LICENSING ACTS. 4.

—— —— s. 40 - - - - 455
See LICENSING ACTS. 2.

36 & 37 Vict. c. 66, s. 25, sub-s. 6—*Judicature*
See ASSIGNMENT. 613

37 & 38 Vict. c. 49, s. 9—*Licensing* - 449
See LICENSING ACTS. 3.

—— —— s. 10 - - - - 308
See LICENSING ACTS. 4.

—— —— s. 15 - - - 154, 607
See LICENSING ACTS. 6, 7.

38 & 39 Vict. c. 55, ss. 4, 13, 15, 21, 94, 95—*Public Health* - - - 41
See LOCAL GOVERNMENT. 3.

—— —— ss. 116, 117, 308 - - 286
See LOCAL GOVERNMENT. 2.

—— —— s. 124 - - 191, 301
See JUSTICES. 1, 2.

—— —— s. 157 - - - - 664
See LOCAL GOVERNMENT.

38 & 39 Vict. c. 90—*Employers and Workmen* 1
See INFANT.

39 & 40 Vict. c. 75, ss. 2, 17, 20—*Rivers Pollution Prevention* - - - 385
See RIVER.

41 & 42 Vict. c. 26, s. 28, sub-s. 2—*Parliamentary and Municipal Registration* - 273
See PARLIAMENT.

41 & 42 Vict. c. 49, s. 25—*Weights and Measures*
See WEIGHTS AND MEASURES. 2. 673

43 & 44 Vict. c. 19, s. 57—*Taxes—Management*
See BANKRUPTCY. 9. 145

STATUTES—*continued.*

43 & 44 Vict. c. 47—*Ground Game* - 436
See GAME.

44 & 45 Vict. c. 41, s. 14, sub-ss. 1, 6—*Conveyancing and Law of Property* - 79
See LANDLORD AND TENANT. 2.

44 & 45 Vict. c. 61, s. 4—*Sunday Closing—Wales* - - - - 308
See LICENSING ACTS. 4.

45 & 46 Vict. c. 38, s. 2, sub-s. 1—*Settled Land*
See REVENUE. 1. 253

45 & 46 Vict. c. 43, ss. 7, 9—*Bills of Sale* 517
See BILL OF SALE.

45 & 46 Vict. c. 61, s. 82—*Bills of Exchange* 172
See BANKER.

46 & 47 Vict. c. 34, s. 2, sub-s. 1—*Cheap Trains* - - - - 267
See RAILWAY. 2.

46 & 47 Vict. c. 52, s. 6, sub-s. 2; Sched. I., r. 12, and Sched. II., rr. 11—13—*Bankruptcy* - - - - 549
See BANKRUPTCY. 4.

—— —— s. 37 - - - - 62
See BANKRUPTCY. 8.

—— —— s. 44 (iii.) - - - 679
See BANKRUPTCY. 6.

—— —— ss. 44, 53 - - - 560
See BANKRUPTCY. 13.

—— —— ss. 44, 54 - - - 54
See BANKRUPTCY. 2.

—— —— s. 47 - - - - 57
See BANKRUPTCY. 14.

—— —— s. 55 - - - - 579
See BANKRUPTCY. 7.

—— —— s. 58, 63, Forms 122 (*a*), 126 - 50
See BANKRUPTCY. 1.

—— —— s. 82 - - - - 97
See BANKRUPTCY. 12.

—— —— ss. 85, 86, 87 - - - 587
See BANKRUPTCY. 10.

—— —— s. 125, sub-ss. 1, 2, 5, 9 - 347
See BANKRUPTCY. 5.

46 & 47 Vict. c. 61, s. 57—*Agricultural Holdings* - - - - - 618
See LANDLORD AND TENANT. 1.

51 & 52 Vict. c. 8, s. 24, sub-s. 3—*Customs and Inland Revenue* - - - 226
See REVENUE. 5.

52 & 53 Vict. c. 21, s. 21, Sched. III.—*Weights and Measures* - - - 94
See WEIGHTS AND MEASURES. 1.

53 & 54 Vict. c. 59, s. 51—*Public Health* 121
See LICENSING ACTS. 3.

53 & 54 Vict. c. 71, s. 10—*Bankruptcy* - 62
See BANKRUPTCY. 8.

—— —— s. 11 - - - 54, 566
See BANKRUPTCY. 2, 3.

54 & 55 Vict. c. 39, ss. 54, 59—*Stamps* - 7
See REVENUE. 7.

—— —— s. 101 - - - - 158
See REVENUE. 8.

—— —— Sched. I. - - - 652
See REVENUE. 9.

STATUTES—*continued.*

55 Vict. c. 9, s. 1—*Gaming* - - 560
See BANKRUPTCY. 13.

55 & 56 Vict. c. 13, s. 2, sub-s. 2—*Conveyancing*
See LANDLORD AND TENANT. 2. 79

56 & 57 Vict. c. 61, s. 1 (*b*)—*Public Authorities Protection* - - - - 282
See PUBLIC AUTHORITIES.

57 & 58 Vict. c. 30, s. 2, sub-s. 1 (*b*); s. 3, sub-s. 1—*Finance Act* - - 595
See REVENUE. 2.

—— —— s. 2, sub-s. 1 (*b*); s. 5, sub-s. 2 245
See REVENUE. 3.

—— —— s. 2, sub-s. 1 (*c*); s. 7, sub-s. 7 238
See REVENUE. 4.

—— —— s. 5, sub-s. 1; s. 22, sub-s. 1 253
See REVENUE. 1.

57 & 58 Vict. c. 60, s. 186—*Merchant Shipping*
See SHIPPING. 5. 217

—— —— s. 503 - - - - 502
See PRACTICE. 7.

57 & 58 Vict. c. clxxxi., s. 36 (ii.)—*Liverpool Corporation* - - - - 197
See RAILWAY. 3.

57 & 58 Vict. c. ccxiii., s. 74, sub-s. 2—*London—Building* - - - - 193
See LONDON. 1.

—— —— s. 86 - - - - 277
See LONDON. 2.

60 & 61 Vict. c. 37, s. 1, sub-s. 1—*Workmen's Compensation* - - - 319
See EMPLOYER AND WORKMAN. 10.

—— —— s. 1, sub-s. 2 (*a*) - - 506
See EMPLOYER AND WORKMAN. 6.

—— —— s. 1, sub-ss. 2 (*b*), 4 - - 333
See EMPLOYER AND WORKMAN. 8.

—— —— s. 4 - - - - 521
See EMPLOYER AND WORKMAN. 1.

—— —— s. 7 - - 132, 136, 142
See EMPLOYER AND WORKMAN. 3, 7, 9.

—— —— Sched. I. clause 1 (*a*), (i.) - 521
See EMPLOYER AND WORKMAN. 1.

—— —— Sched. I., clause 1 (*b*) - 124
See EMPLOYER AND WORKMAN. 2.

—— —— Sched. 1., clause 1 (*b*), clause 2 330
See EMPLOYER AND WORKMAN. 5.

60 & 61 Vict. c. cxvii.—*Crowborough District Water* - - - - 664
See LOCAL GOVERNMENT. 1.

STOCK EXCHANGE—Surplus in hands of official assignee of—Title of trustee in bankruptcy - - - - 555
See BANKRUPTCY. 11.

STREETS—Betting in — By-law — Statutory enactment—Repugnancy - - 34
See GAMING. 1.

STRIKE — Compensation — Personal injury by accident—Average weekly earnings—Break in employment - - 124
See EMPLOYER AND WORKMAN. 2.

STRIKING OUT PLEADINGS—Claim for maliciously presenting a bankruptcy petition without alleging special damage 106
See PRACTICE. 6.

SUNDAY CLOSING (WALES) ACT—Offences—Falsely pretending to be a traveller—Railway station - - - - 308
See LICENSING ACTS. 4.

SUPPORT—Right of—Stamp—Receipt for compensation for not working coal adjacent to railway - - - - 652
See REVENUE. 9.

SURRENDER—Life interest to remainderman—Estate duty - - - 238
See REVENUE. 4.

TAXES.
See Cases under REVENUE.

TENANT.
See Cases under LANDLORD AND TENANT.

TIME—Fine on admittance—Limitation of action—Point from which time begins to run - - - - - 603
See COPYHOLD.

TOOLS OF TRADE—Execution creditor—Levy by sheriff—Small Debts Act - 54
See BANKRUPTCY. 2.

TRADE—Order and disposition—Reputed ownership—Stands used to shew off goods in shop - - - - - 679
See BANKRUPTCY. 7.

TRANSFER—Action under Fatal Accidents Acts—Decree for limitation of liability in the Admiralty Division - - 502
See PRACTICE. 7.

TRAVELLER—Falsely pretending to be a—Railway station—Offences - 308
See LICENSING ACTS. 4.

TROVER—*Conversion — Estoppel — Proximate Cause of Loss—Liability of Warehouseman.*

N. pledged with the plaintiffs as security for an advance eighteen hogsheads of tobacco which were in the custody of the defendants as warehousemen. He subsequently repaid the advance on one of the hogsheads, and presented to the plaintiffs for their signature a delivery order on the defendants. On the order the place for the quantity was left blank. The plaintiffs signed the order, and N., having filled in the blank space with the words "eighteen hogsheads," obtained delivery of them all from the defendants, and then disposed of them. In an action against the defendants for the conversion of the seventeen hogsheads:—

Held, that the plaintiffs could not succeed, since they had impliedly given N. authority to fill up the blank in the delivery order, and were now estopped from shewing that that authority was limited.

In the second action it appeared that N. had pledged with the plaintiffs two separate consignments of tobacco. He paid off the advance on one consignment, and presented to the plaintiffs a properly drawn delivery order in respect of it. They signed it, and N. subsequently added above their signature the description and distinguishing marks of the other consignment, and thus obtained from the defendants delivery of both consignments:—

Held, that an action for conversion would lie against the defendants, since the plaintiffs had not been guilty of any negligence which was the proximate cause of the wrongful delivery.

In the third action it appeared that N., after fraudulently obtaining the tobacco as above stated, had pledged it with the defendant bank as security for an advance, and before the fraud was discovered had repaid the advance and recovered possession of the tobacco:—

Held, that no action for conversion would lie against the defendant bank, since N.'s dealing with it had been concluded before the plaintiffs discovered the fraud. UNION CREDIT BANK *v.* MERSEY DOCKS AND HARBOUR BOARD. SAME *v.* SAME. SAME *v.* SAME AND NORTH AND SOUTH WALES BANK - - - - Bigham J. 205

TRUST—Declaration of—Stamp—"Conveyance of sale"—Agreement for sale of equitable interest - - - - 7
See REVENUE. 7.

TRUSTEE IN BANKRUPTCY.
See Cases under BANKRUPTCY.

UNDISCHARGED BANKRUPT—After-acquired property—Wagering contract—Stakes claimed by trustee - - - 560
See BANKRUPTCY. 13.

VACATING OFFICE—Trustee in bankruptcy—Rescission of receiving order—Restoration - - - - - 587
See BANKRUPTCY. 10.

VACCINATION — *Mandamus — Alternative Remedy — Legal Remedy — Duty of Guardians to appoint Vaccination Officer — Vaccination Act*, 1871 (34 & 35 *Vict. c.* 98), *s.* 5.

The duty imposed upon guardians by s. 5 of the Vaccination Act, 1871, to appoint a vaccination officer may be enforced by a writ of mandamus upon the application of the Local Government Board. THE QUEEN *v.* LEICESTER UNION - - - - Div. Ct. 632

VOLUNTARY SETTLEMENT—Gift of jewels and money - - - - 57
See BANKRUPTCY. 14.

VOLUNTEERS—*Metropolis Management Acts—Exemptions — Volunteer Corps — Storehouse and Drill-hall—Sewerage and Drainage.*

A building consisting of an armoury, storehouse, and drill-hall of a volunteer corps, which is vested in the commanding officer of the corps and is intended for the use of the corps only, is not exempt from the operation of the sanitary provisions of the Metropolis Management Act, 1855, on the ground that it is occupied and used solely for the purposes of the Crown. WESTMINSTER VESTRY *v.* HOSKINS Div. Ct. 474

WAGERING CONTRACT—Undischarged bankrupt—After-acquired property—Stakes claimed by trustee - - - 560
See BANKRUPTCY. 13.

WAREHOUSEMAN—Liability of—Conversion—Estoppel—Proximate cause of loss 205
See TROVER.

WATER—Lawful exercise of right to impound or divert—Pollution of river—Nuisance *See* RIVER. 385

—— Water tower—Effect of Public Health Acts on subsequent special water company's Act—By-laws—Buildings - 664
See LOCAL GOVERNMENT. 1.

WATERWORKS—Rateable value—Cost of construction—Works not directly earning profit in parish - - - - 14
See POOR-RATE.

WEIGHTS AND MEASURES — *Sale of Coal—Delivery of Ticket—Insertion of Seller's Name—Name under which Seller trades — Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 21, *Sched. III.*

The appellant was convicted for default in compliance with the provisions of the Weights and Measures Act, 1889, s. 21, with respect to the delivery of a ticket with a ton of coal delivered by him, by means of a vehicle, to a purchaser. He had delivered a ticket in the form in the third schedule to the Act; in the place for the name of the seller were inserted the words "Sellers the Co-operative Coal Company." This was the name under which the appellant traded, but there was no real company. There was no intent to defraud.

On a case stated for the opinion of the Court:—

Held, that the provision in the Act, requiring the insertion in the ticket of the seller's name, was sufficiently complied with by the insertion of the name under which the appellant carried on his business, and the conviction was wrong. CAMERON *v.* TYLER - - - DIV. CT. 94

2. —— *Weighing Machine—Weight indicated exceeding Weight of Article sold — "False or Unjust" — Weights and Measures Act*, 1878 (41 & 42 *Vict. c.* 49), *s.* 25.

The respondent was charged under s. 25 of the Weights and Measures Act, 1878, with having in his possession for use for trade a weighing machine which was false or unjust. The machine, which was used for weighing tea, had on it, under the scoop in which the tea was placed, a piece of paper, the effect of which was to make the machine indicate a weight exceeding, by the weight of the paper, the weight of the tea in the scoop. The paper was placed where it was for the purpose of convenience and expedition in weighing, because it would take longer to weigh the tea if it were placed in the bag in which it was to be sold before being put into the scoop. The paper weighed less than the bag in which the tea was sold.

On a case stated:—

Held, that, as the machine, when used with the paper, indicated a weight in excess of the true weight of the tea sold, it was "false or unjust," within the meaning of s. 25, and the respondent ought to be convicted. LANE *v.* RENDALL - - - - DIV. CT. 673

WHARF — Employment on, in, or about a factory—Compensation Act - 136
See EMPLOYER AND WORKMAN. 9.

WIDOW — Action against widow on contract made during coverture—Form of judgment - - - - 419
See HUSBAND AND WIFE.

WIFE - - - - - - - 419
See HUSBAND AND WIFE.

WINDING-UP OF COMPANY — Creditor — Attachment of debt—Garnishee order—Judgment - - - 428
See PRACTICE. 1.

WINE AND BEERHOUSE ACT, 1869—Licence
See LICENSING ACTS. 2, 7. 455, 607

WORDS—"Customer" - - - 172
See BANKER.

——"Engineering work" - - - 132
See EMPLOYER AND WORKMAN. 3.

——"Furniture" - - - - 401
See INSURANCE, MARINE. 3.

——"Passage home" - - - 217
See SHIPPING. 5.

——"Receipt" - - - - 158
See REVENUE. 8.

——"Sewer" - - - - 41
See LOCAL GOVERNMENT. 3.

——"Used" - - - - - 380
See GAMING. 2.

WORKMAN.
See Cases under EMPLOYER AND WORKMAN.

WORKMEN'S COMPENSATION RULES, 1898, Rules 19–23 - - - 521
See EMPLOYER AND WORKMAN. 1.

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